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NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Lumber Co.*, 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

MATSUSHITA ELECTRIC INDUSTRIAL CO. LTD, ET AL. *v.* ZENITH RADIO CORP. ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 83-2004. Argued November 12, 1985—Decided March 26, 1986

Petitioners are 21 Japanese corporations that manufacture and/or sell "consumer electronic products" (CEPs) (primarily television sets). Respondents are American corporations that manufacture and sell television sets. In 1974, respondents brought an action in Federal District Court, alleging that petitioners, over a 20-year period, had illegally conspired to drive American firms from the American CEP market by engaging in a scheme to fix and maintain artificially high prices for television sets sold by petitioners in Japan and, at the same time, to fix and maintain low prices for the sets exported to and sold in the United States. Respondents claim that various portions of this scheme violated, *inter alia*, §§ 1 and 2 of the Sherman Act, § 2(a) of the Robinson-Patman Act, and § 73 of the Wilson Tariff Act. After several years of discovery, petitioners moved for summary judgment on all claims. The District Court then directed the parties to file statements listing all the documentary evidence that would be offered if the case went to trial. After the statements were filed, the court found the bulk of the evidence on which respondents relied was inadmissible, that the admissible evidence did not raise a genuine issue of material fact as to the existence of the alleged conspiracy, and that any inference of conspiracy was unreasonable. Summary judgment therefore was granted in petitioners' favor. The Court of Appeals reversed. After determining that much of the evidence excluded by the District Court was admissible, the Court of Appeals held that the District Court erred in granting a summary judgment and that there was both direct and circumstantial evidence of a conspiracy. Based on inferences drawn from the evidence, the Court of Appeals concluded that a reasonable factfinder could find a conspiracy to depress prices in the American market in order to drive out American competitors, which conspiracy was funded by excess profits obtained in the Japanese market.

Held: The Court of Appeals did not apply proper standards in evaluating the District Court's decision to grant petitioners' motion for summary judgment. Pp. 7–22.

(a) The "direct evidence" on which the Court of Appeals relied—petitioners' alleged supracompetitive pricing in Japan, the "five-company rule" by which each Japanese producer was permitted to sell only to five American distributors, and the "check prices" (minimum prices fixed by agreement with the Japanese Government for CEPs exported to the United States) insofar as they established minimum prices in the United States—cannot by itself give respondents a cognizable claim against petitioners for antitrust damages. Pp. 7–8.

(b) To survive petitioners' motion for a summary judgment, respondents must establish that there is a genuine issue of material fact as to whether petitioners entered into an illegal conspiracy that caused respondents to suffer a cognizable injury. If the factual context renders respondents' claims implausible, *i.e.*, claims that make no economic sense, respondents must offer more persuasive evidence to support their claims than would otherwise be necessary. To survive a motion for a summary judgment, a plaintiff seeking damages for a violation of § 1 of the Sherman Act must present evidence "that tends to exclude the possibility" that the alleged conspirators acted independently. Thus, respondents here must show that the inference of a conspiracy is reasonable in light of the competing inferences of independent action or collusive action that could not have harmed respondents. Pp. 10–13.

(c) Predatory pricing conspiracies are by nature speculative. They require the conspirators to sustain substantial losses in order to recover uncertain gains. The alleged conspiracy is therefore implausible. Moreover, the record discloses that the alleged conspiracy has not succeeded in over two decades of operation. This is strong evidence that the conspiracy does not in fact exist. The possibility that petitioners have obtained supracompetitive profits in the Japanese market does not alter this assessment. Pp. 13–18.

(d) Mistaken inferences in cases such as this one are especially costly, because they chill the very conduct that the antitrust laws are designed to protect. There is little reason to be concerned that by granting summary judgment in cases where the evidence of conspiracy is speculative or ambiguous, courts will encourage conspiracies. Pp. 18–20.

(e) The Court of Appeals erred in two respects: the "direct evidence" on which it relied had little, if any, relevance to the alleged predatory pricing conspiracy, and the court failed to consider the absence of a plausible motive to engage in predatory pricing. In the absence of any rational motive to conspire, neither petitioners' pricing practices, their conduct in the Japanese market, nor their agreements respecting prices and distributions in the American market sufficed to create a "genuine issue for trial" under Federal Rule of Civil Procedure 56(e). On remand, the Court of Appeals may consider whether there is other, unambiguous evidence of the alleged conspiracy. Pp. 20–22.

723 F. 2d 238, reversed and remanded.

POWELL, J., delivered the opinion of the Court, in which BURGER, C. J., and MARSHALL, REHNQUIST, and O'CONNOR, JJ., joined. WHITE, J., filed a dissenting opinion, in which BRENNAN, BLACKMUN, and STEVENS, JJ., joined.

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D. C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

No. 83-2004

MATSUSHITA ELECTRIC INDUSTRIAL CO., LTD., ET AL., PETITIONERS *v.* ZENITH RADIO CORPORATION ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

[March 26 1986]

JUSTICE POWELL delivered the opinion of the Court.

This case requires that we again consider the standard district courts must apply when deciding whether to grant summary judgment in an antitrust conspiracy case.

I

Stating the facts of this case is a daunting task. The opinion of the Court of Appeals for the Third Circuit runs to 69 pages; the primary opinion of the District Court is more than three times as long. 723 F. 2d 238 (CA3 1983); 513 F. Supp. 1100 (ED Pa. 1981). Two respected District Judges each have authored a number of opinions in this case; the published ones alone would fill an entire volume of the Federal Supplement. In addition, the parties have filed a forty-volume appendix in this Court that is said to contain the essence of the evidence on which the District Court and the Court of Appeals based their respective decisions.

We will not repeat what these many opinions have stated and restated, or summarize the mass of documents that comprise the record on appeal. Since we review only the standard applied by the Court of Appeals in deciding this case, and not the weight assigned to particular pieces of evidence, we find it unnecessary to state the facts in great detail. What follows is a summary of this case's long history.

A

Petitioners, defendants below, are 21 corporations that manufacture or sell "consumer electronic products" (CEPs)—for the most part, television sets. Petitioners include both Japanese manufacturers of CEPs and American firms, controlled by Japanese parents, that sell the Japanese-manufactured products. Respondents, plaintiffs below, are Zenith Radio Corporation (Zenith) and National Union Electric Corporation (NUE). Zenith is an American firm that manufactures and sells television sets. NUE is the corporate successor to Emerson Radio Company, an American firm that manufactured and sold television sets until 1970, when it withdrew from the market after sustaining substantial losses. Zenith and NUE began this lawsuit in 1974,[1] claiming that petitioners had illegally conspired to drive American firms from the American CEP market. According to respondents, the gist of this conspiracy was a "'scheme to raise, fix and maintain artificially *high* prices for television receivers sold by [petitioners] in Japan and, at the same time, to fix and maintain *low* prices for television receivers exported to and sold in the United States.'" 723 F. 2d, at 251 (quoting respondents' Preliminary Pretrial Memorandum). These "low prices" were allegedly at levels that produced substantial losses for petitioners. 513 F. Supp., at 1125. The conspiracy allegedly began as early as 1953, and according to respondents was in full operation by sometime in the late 1960's. Respondents claimed that various portions of this scheme violated §§1 and 2 of the Sherman Act, §2(a) of the Robinson-Patman Act, §73 of the Wilson Tariff Act, and the Antidumping Act of 1916.

After several years of detailed discovery, petitioners filed motions for summary judgment on all claims against them.

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[1] NUE had filed its complaint four years earlier, in the District Court for the District of New Jersey. Zenith's complaint was filed separately in 1974, in the Eastern District of Pennsylvania. The two cases were consolidated in the Eastern District of Pennsylvania in 1974.

The District Court directed the parties to file, with preclusive effect, "Final Pretrial Statements" listing all the documentary evidence that would be offered if the case proceeded to trial. Respondents filed such a statement, and petitioners responded with a series of motions challenging the admissibility of respondents' evidence. In three detailed opinions, the District Court found the bulk of the evidence on which Zenith and NUE relied inadmissible.[2]

The District Court then turned to petitioners' motions for summary judgment. In an opinion spanning 217 pages, the court found that the admissible evidence did not raise a genuine issue of material fact as to the existence of the alleged conspiracy. At bottom, the court found, respondents' claims rested on the inferences that could be drawn from petitioners' parallel conduct in the Japanese and American markets, and from the effects of that conduct on petitioners' American competitors. 513 F. Supp., at 1125–1127. After reviewing the evidence both by category and *in toto*, the court found that any inference of conspiracy was unreasonable, because (i) some portions of the evidence suggested that petitioners conspired in ways that did not injure respondents, and (ii) the evidence that bore directly on the alleged price-cutting conspiracy did not rebut the more plausible inference that petitioners were cutting prices to compete in the American market and not to monopolize it. Summary judgment therefore was granted on respondents' claims under § 1 of the Sherman Act and the Wilson Tariff Act. Because the Sherman Act § 2 claims, which alleged that petitioners had combined to monopolize the American CEP market, were functionally indistinguishable from the § 1 claims, the court dismissed them also. Finally, the court found that the Robinson-Patman Act claims depended on the same supposed conspiracy as the Sherman Act claims. Since the court had found no genuine issue of fact as to the conspiracy, it entered judgment in petitioners' favor on those claims as well.[3]

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[2] The inadmissible evidence included various government records and reports, *Zenith Radio Corp.* v. *Matsushita Electric Industrial Co.*, 505 F. Supp. 1125 (ED Pa. 1980), business documents offered pursuant to various hearsay exceptions, *Zenith Radio Corp.* v. *Matsushita Electric Industrial Co.*, 505 F. Supp. 1190 (ED Pa. 1980), and a large portion of the expert testimony that respondents proposed to introduce. *Zenith Radio Corp.* v. *Matsushita Electric Industrial Co.*, 505 F. Supp. 1313 (ED Pa. 1981).

B

The Court of Appeals for the Third Circuit reversed.[4] The court began by examining the District Court's evidentiary rulings, and determined that much of the evidence excluded by the District Court was in fact admissible. 723 F. 2d, at 260–303. These evidentiary rulings are not before us. See 471 U. S. —— (1985) (limiting grant of certiorari).

On the merits, and based on the newly enlarged record, the court found that the District Court's summary judgment decision was improper. The court acknowledged that "there are legal limitations upon the inferences which may be drawn from circumstantial evidence," 723 F. 2d, at 304, but it found that "the legal problem . . . is different" when "there is direct evidence of concert of action." *Ibid.* Here, the court concluded, "there is both direct evidence of certain kinds of concert of action and circumstantial evidence having some tendency to suggest that other kinds of concert of action may have occurred." *Id.*, at 304–305. Thus, the court reasoned, cases concerning the limitations on inferring conspiracy from ambiguous evidence were not dispositive. *Id.*, at 305. Turning to the evidence, the court determined that a factfinder reasonably could draw the following conclusions:

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[3] The District Court ruled separately that petitioners were entitled to summary judgment on respondents' claims under the Antidumping Act of 1916. *Zenith Radio Corp.* v. *Matsushita Electric Industrial Co.*, 494 F. Supp. 1190 (ED Pa. 1980). Respondents appealed this ruling, and the Court of Appeals reversed in a separate opinion issued the same day as the opinion concerning respondents' other claims. *In re Japanese Electronic Products Antitrust Litigation*, 723 F. 2d 319 (CA3 1983).

Petitioners ask us to review the Court of Appeals' Antidumping Act decision along with its decision on the rest of this mammoth case. The Antidumping Act claims were not, however, mentioned in the questions presented in the petition for certiorari, and they have not been independently argued by the parties. See this Court's Rule 21.1(a). We therefore decline the invitation to review the Court of Appeals' decision on those claims.

[4] As to three of the 24 defendants, the Court of Appeals affirmed the entry of summary judgment. Petitioners are the 21 defendants who remain in the case.

> 1. The Japanese market for CEPs was characterized by oligopolistic behavior, with a small number of producers meeting regularly and exchanging information on price and other matters. *Id.*, at 307. This created the opportunity for a stable combination to raise both prices and profits in Japan. American firms could not attack such a combination because the Japanese government imposed significant barriers to entry. *Ibid.*
>
> 2. Petitioners had relatively higher fixed costs than their American counterparts, and therefore needed to operate at something approaching full capacity in order to make a profit. *Ibid.*
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> 3. Petitioners' plant capacity exceeded the needs of the Japanese market. *Ibid.*
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> 4. By formal agreements arranged in cooperation with Japan's Ministry of International Trade and Industry (MITI), petitioners fixed minimum prices for CEPs exported to the American market. *Id.*, at 310. The parties refer to these prices as the "check prices," and to the agreements that require them as the "check price agreements."
>
> 5. Petitioners agreed to distribute their products in the United States according to a "five-company rule": each Japanese producer was permitted to sell only to five American distributors. *Ibid.*
>
> 6. Petitioners undercut their own check prices by a variety of rebate schemes. *Id.*, at 311. Petitioners sought to conceal these rebate schemes both from the

> United States Customs Service and from MITI, the former to avoid various customs regulations as well as action under the antidumping laws, and the latter to cover up petitioners' violations of the check price agreements.

Based on inferences from the foregoing conclusions,[5] the Court of Appeals concluded that a reasonable factfinder could find a conspiracy to depress prices in the American market in order to drive out American competitors, which conspiracy was funded by excess profits obtained in the Japanese market. The court apparently did not consider whether it was as plausible to conclude that petitioners' price-cutting behavior was independent and not conspiratorial.

The court found it unnecessary to address petitioners' claim that they could not be held liable under the antitrust laws for conduct that was compelled by a foreign sovereign. The claim, in essence, was that because MITI required petitioners to enter into the check price agreements, liability could not be premised on those agreements. The court concluded that this case did not present any issue of sovereign compulsion, because the check price agreements were being used as "evidence of a low export price conspiracy" and not as an independent basis for finding antitrust liability. The court also believed it was unclear that the check prices in fact were mandated by the Japanese government, notwithstanding a statement to that effect by MITI itself. *Id.*, at 315.

We granted certiorari to determine (i) whether the Court of Appeals applied the proper standards in evaluating the District Court's decision to grant petitioners' motion for summary judgment, and (ii) whether petitioners could be held liable under the antitrust laws for a conspiracy in part compelled by a foreign sovereign. 471 U. S. —— (1985). We reverse on the first issue, but do not reach the second.

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[5] In addition to these inferences, the court noted that there was expert opinion evidence that petitioners' export sales "generally were at prices which produced losses, often as high as twenty-five percent on sales." 723 F. 2d, at 311. The court did not identify any direct evidence of below-cost pricing; nor did it place particularly heavy reliance on this aspect of the expert evidence. See n. 19, *infra*.

II

We begin by emphasizing what respondents' claim is *not*. Respondents cannot recover antitrust damages based solely on an alleged cartelization of the Japanese market, because American antitrust laws do not regulate the competitive conditions of other nations' economies. *United States* v. *Aluminum Company of America*, 148 F. 2d 416, 443 (CA2 1945) (L. Hand, J.); 1 P. Areeda & D. Turner, Antitrust Law ¶236d (1978).[6] Nor can respondents recover damages for any conspiracy by petitioners to charge higher than competitive prices in the American market. Such conduct would indeed violate the Sherman Act, *United States* v. *Trenton Potteries Co.*, 273 U. S. 392 (1927); *United States* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150, 223 (1940), but it could not injure respondents: as petitioners' competitors, respondents stand to gain from any conspiracy to raise the market price in CEPs.

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[6] The Sherman Act does reach conduct outside our borders, but only when the conduct has an effect on American commerce. *Continental Ore Co.* v. *Union Carbide & Carbon Corp.*, 370 U. S. 690, 704 (1962) ("A conspiracy to monopolize or restrain the domestic or foreign commerce of the United States is not outside the reach of the Sherman Act just because part of the conduct complained of occurs in foreign countries"). The effect on which respondents rely is the artificially depressed level of prices for CEPs in the United States.

Petitioners' alleged cartelization of the Japanese market could not have caused that effect over a period of some two decades. Once petitioners decided, as respondents allege, to reduce output and raise prices in the Japanese market, they had the option of either producing fewer goods or selling more goods in other markets. The most plausible conclusion is that petitioners chose the latter option because it would be more profitable than the former. That choice does not flow from the cartelization of the Japanese market. On the contrary, were the Japanese market perfectly competitive petitioners would still have to choose whether to sell goods overseas, and would still presumably make that choice based on their profit expectations. For this reason, respondents' theory of recovery depends on proof of the asserted price-cutting conspiracy in this country.

Cf. *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.*, 429 U. S. 477, 488–489 (1977). Finally, for the same reason, respondents cannot recover for a conspiracy to impose nonprice restraints that have the effect of either raising market price or limiting output. Such restrictions, though harmful to competition, actually *benefit* competitors by making supracompetitive pricing more attractive. Thus, neither petitioners' alleged supracompetitive pricing in Japan, nor the five-company rule that limited distribution in this country, nor the check prices insofar as they established minimum prices in this country, can by themselves give respondents a cognizable claim against petitioners for antitrust damages. The Court of Appeals therefore erred to the extent that it found evidence of these alleged conspiracies to be "direct evidence" of a conspiracy that injured respondents. See 723 F. 2d, at 304–305.

Respondents nevertheless argue that these supposed conspiracies, if not themselves grounds for recovery of antitrust damages, are circumstantial evidence of another conspiracy that *is* cognizable: a conspiracy to monopolize the American market by means of pricing below the market level.[7] The thrust of respondents' argument is that petitioners used their monopoly profits from the Japanese market to fund a concerted campaign to price predatorily and thereby drive respondents and other American manufacturers of CEPs out of business. Once successful, according to respondents, petitioners would cartelize the American CEP market, restricting output and raising prices above the level that fair competition would produce. The resulting monopoly profits, respondents contend, would more than compensate petitioners for the losses they incurred through years of pricing below market level.

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[7] Respondents also argue that the check prices, the five-company rule, and the price-fixing in Japan are all part of one large conspiracy that includes monopolization of the American market through predatory pricing. The argument is mistaken. However one decides to describe the contours of the asserted conspiracy—whether there is one conspiracy or several—respondents must show that the conspiracy caused them an injury for which the antitrust laws provide relief. *Associated General Contractors* v. *California State Council of Carpenters*, 459 U. S. 519, 538–540 (1983); *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.*, 429 U. S. 477, 488–489 (1977); *supra;* see also Note, Antitrust Standing, Antitrust Injury, and the Per Se Standard, 93 Yale L. J. 1309 (1984). That showing depends in turn on proof that petitioners conspired to price predatorily in the American market, since the other conduct involved in the alleged conspiracy cannot have caused such an injury.

The Court of Appeals found that respondents' allegation of a horizontal conspiracy to engage in predatory pricing,[8] if proved,[9] would be a *per se* violation of § 1 of the Sherman

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[8] Throughout this opinion, we refer to the asserted conspiracy as one to price "predatorily." This term has been used chiefly in cases in which a single firm, having a dominant share of the relevant market, cuts its prices in order to force competitors out of the market, or perhaps to deter potential entrants from coming in. *E. g., Southern Pacific Communications Co.* v. *American Telephone & Telegraph Co.*, 238 U. S. App. D. C. 309, 331–336, 740 F. 2d 980, 1002–1007 (1984), cert. denied, 469 U. S. —— (1985). In such cases, "predatory pricing" means pricing below some appropriate measure of cost. *E. g., Barry Wright Corp.* v. *ITT Grinnell Corp.*, 724 F. 2d 227, 232–235 (CA1 1983); see *Utah Pie Co.* v. *Continental Baking Co.*, 386 U. S. 685, 698, 701, 702, n. 14 (1967).

There is a good deal of debate, both in the cases and in the law reviews, about what "cost" is relevant in such cases. We need not resolve this debate here, because unlike the cases cited above, this is a Sherman Act § 1 case. For purposes of this case, it is enough to note that respondents have not suffered an antitrust injury unless petitioners conspired to drive respondents out of the relevant markets by (i) pricing below the level necessary to sell their products, or (ii) pricing below some appropriate measure of cost. An agreement without these features would either leave respondents in the same position as would market forces or would actually benefit respondents by raising market prices. Respondents therefore may not complain of conspiracies that, for example, set maximum prices above market levels, or that set minimum prices at *any* level.

[9] We do not consider whether recovery should *ever* be available on a theory such as respondents' when the pricing in question is above some measure of incremental cost. See generally Areeda & Turner, Predatory Pricing and Related Practices Under Section 2 of the Sherman Act, 88 Harv. L. Rev. 697, 709–718 (1975) (discussing cost-based test for use in § 2 cases).

Act. 723 F. 2d, at 306. Petitioners did not appeal from that conclusion. The issue in this case thus becomes whether respondents adduced sufficient evidence in support of their theory to survive summary judgment. We therefore examine the principles that govern the summary judgment determination.

III

To survive petitioners' motion for summary judgment,[10] respondents must establish that there is a genuine issue of material fact as to whether petitioners entered into an illegal conspiracy that caused respondents to suffer a cognizable injury. Fed. Rule Civ. Proc. 56(e);[11] *First National Bank of Arizona* v. *Cities Service Co.*, 391 U. S. 253, 288–289 (1968). This showing has two components. First, respondents must show more than a conspiracy in violation of the antitrust laws; they must show an injury to them resulting from the illegal conduct. Respondents charge petitioners with a whole host of conspiracies in restraint of trade. *Supra*, at 7–8. Except for the alleged conspiracy to monopolize the American market through predatory pricing, these alleged

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As a practical matter, it may be that only direct evidence of below-cost pricing is sufficient to overcome the strong inference that rational businesses would not enter into conspiracies such as this one. See Part IV–A, *infra*.

[10] Respondents argued before the district court that petitioners had failed to carry their initial burden under Rule 56(c) of demonstrating the absence of a genuine issue of material fact. See *Adickes* v. *S. H. Kress & Co.*, 398 U. S. 144, 157 (1970). Cf. *Catrett* v. *Johns-Manville Sales Corp.*, 244 U. S. App. D.C. 160, 756 F. 2d 181 (1985), cert. granted, 474 U. S. —— (1985). That issue was resolved in petitioners' favor, and is not before us.

[11] Rule 56(e) provides, in relevant part:

"When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him."

conspiracies could not have caused respondents to suffer an "antitrust injury," *Brunswick Corp.* v. *Pueblo Bowl-O-Mat*, 429 U. S., at 489, because they actually tended to benefit respondents. *Supra*, at 7–8. Therefore, unless, in context, evidence of these "other" conspiracies raises a genuine issue concerning the existence of a predatory pricing conspiracy, that evidence cannot defeat petitioners' summary judgment motion.

Second, the issue of fact must be "genuine." Fed. Rule Civ. Proc. 56(c), (e). When the moving party has carried its burden under Rule 56(c),[12] its opponent must do more than simply show that there is some metaphysical doubt as to the material facts. See *DeLuca* v. *Atlantic Refining Co.*, 176 F. 2d 421, 423 (CA2 1949) (L. Hand, J.), cert. denied, 338 U. S. 943 (1950); 10A C. Wright, A. Miller, & M. Kane, Federal Practice and Procedure § 2727 (1983); Clark, Special Problems in Drafting and Interpreting Procedural Codes and Rules, 3 Vand. L. Rev. 493, 504–505 (1950). Cf. *Sartor* v. *Arkansas Natural Gas Corp.*, 321 U. S. 620, 627 (1944). In the language of the Rule, the non-moving party must come forward with "specific facts showing that there is a *genuine issue for trial.*" Fed. Rule Civ. Proc. 56(e) (emphasis added). See also Advisory Committee Note to 1963 Amendment of Fed. Rule Civ. Proc. 56(e), 28 U. S. C. App., p. 626 (purpose of summary judgment is to "pierce the pleadings and to assess the proof in order to see whether there is a genuine need for trial"). Where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no "genuine issue for trial." *Cities Service*, *supra*, at 289.

It follows from these settled principles that if the factual context renders respondents' claim implausible—if the claim is one that simply makes no economic sense—respondents must come forward with more persuasive evidence to support their claim than would otherwise be necessary. *Cities Service* is instructive. The issue in that case was whether proof of the defendant's refusal to deal with the plaintiff supported an inference that the defendant willingly had joined an illegal boycott. Economic factors strongly suggested that the defendant had no motive to join the alleged conspiracy. 391 U. S., at 278–279. The Court acknowledged that, in isolation, the defendant's refusal to deal might well have sufficed to create a triable issue. *Id.*, at 277. But the refusal to deal had to be evaluated in its factual context. Since the defendant lacked any rational motive to join the alleged boycott, and since its refusal to deal was consistent with the defendant's independent interest, the refusal to deal could not by itself support a finding of antitrust liability. *Id.*, at 280.

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[12] See n. 10, *supra*.

Respondents correctly note that "[o]n summary judgment the inferences to be drawn from the underlying facts . . . must be viewed in the light most favorable to the party opposing the motion." *United States* v. *Diebold, Inc.*, 369 U. S. 654, 655 (1962). But antitrust law limits the range of permissible inferences from ambiguous evidence in a § 1 case. Thus, in *Monsanto Co.* v. *Spray-Rite Service Corp.*, 465 U. S. 752 (1984), we held that conduct as consistent with permissible competition as with illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy. *Id.*, at 764. See also *Cities Service, supra*, at 280. To survive a motion for summary judgment or for a directed verdict, a plaintiff seeking damages for a violation of § 1 must present evidence "that tends to exclude the possibility" that the alleged conspirators acted independently. 465 U. S., at 764. Respondents in this case, in other words, must show that the inference of conspiracy is reasonable in light of the competing inferences of independent action or collusive action that could not have harmed respondents. See *Cities Service, supra*, at 280.

Petitioners argue that these principles apply fully to this case. According to petitioners, the alleged conspiracy is one that is economically irrational and practically infeasible. Consequently, petitioners contend, they had no motive to engage in the alleged predatory pricing conspiracy; indeed, they had a strong motive *not* to conspire in the manner respondents allege. Petitioners argue that, in light of the absence of any apparent motive and the ambiguous nature of the evidence of conspiracy, no trier of fact reasonably could find that the conspiracy with which petitioners are charged actually existed. This argument requires us to consider the nature of the alleged conspiracy and the practical obstacles to its implementation.

IV

A

A predatory pricing conspiracy is by nature speculative. Any agreement to price below the competitive level requires the conspirators to forego profits that free competition would offer them. The foregone profits may be considered an investment in the future. For the investment to be rational, the conspirators must have a reasonable expectation of recovering, in the form of later monopoly profits, more than the losses suffered. As then-Professor Bork, discussing predatory pricing by a single firm, explained:

> "Any realistic theory of predation recognizes that the predator as well as his victims will incur losses during the fighting, but such a theory supposes it may be a rational calculation for the predator to view the losses as an investment in future monopoly profits (where rivals are to be killed) or in future undisturbed profits (where rivals are to be disciplined). The future flow of profits, appropriately discounted, must then exceed the present size of the losses." R. Bork, The Antitrust Paradox 145 (1978).

See also McGee, Predatory Pricing Revisited, 23 J. Law & Econ. 289, 295–297 (1980). As this explanation shows, the success of such schemes is inherently uncertain: the short-run loss is definite, but the long-run gain depends on successfully neutralizing the competition. Moreover, it is not enough simply to achieve monopoly power, as monopoly pricing may breed quick entry by new competitors eager to share in the excess profits. The success of any predatory scheme depends on *maintaining* monopoly power for long enough both to recoup the predator's losses and to harvest some additional gain. Absent some assurance that the hoped-for monopoly will materialize, *and* that it can be sustained for a significant period of time, "[t]he predator must make a substantial investment with no assurance that it will pay off." Easterbrook, Predatory Strategies and Counterstrategies, 48 U. Chi. L. Rev. 263, 268 (1981). For this reason, there is a consensus among commentators that predatory pricing schemes are rarely tried, and even more rarely successful. See, *e. g.*, R. Bork, *supra*, at 149–155; Areeda & Turner, Predatory Pricing and Related Practices Under Section 2 of the Sherman Act, 88 Harv. L. Rev. 697, 699 (1975); Easterbrook, *supra;* Koller, The Myth of Predatory Pricing—An Empirical Study, 4 Antitrust Law & Econ. Rev. 105 (1971); McGee, Predatory Price Cutting: The *Standard Oil (N. J.) Case,* 1 J. Law & Econ. 137 (1958); McGee, Predatory Pricing Revisited, 23 J. Law & Econ., at 292–294. See also *Northeastern Telephone Co.* v. *American Telephone & Telegraph Co.*, 651 F. 2d 76, 88 (CA2 1981) ("[N]owhere in the recent outpouring of literature on the subject do commentators suggest that [predatory] pricing is either common or likely to increase"), cert. denied, 455 U. S. 943 (1982).

These observations apply even to predatory pricing by a *single firm* seeking monopoly power. In this case, respondents allege that a large number of firms have conspired over a period of many years to charge below-market prices in order to stifle competition. Such a conspiracy is incalculably more difficult to execute than an analogous plan undertaken by a single predator. The conspirators must allocate the losses to be sustained during the conspiracy's operation, and must also allocate any gains to be realized from its success. Precisely because success is speculative and depends on a willingness to endure losses for an indefinite period, each conspirator has a strong incentive to cheat, letting its partners suffer the losses necessary to destroy the competition while sharing in any gains if the conspiracy succeeds. The necessary allocation is therefore difficult to accomplish. Yet if conspirators cheat to any substantial extent, the conspiracy must fail, because its success depends on depressing the market price for *all* buyers of CEPs. If there are too few goods at the artificially low price to satisfy demand, the would-be victims of the conspiracy can continue to sell at the "real" market price, and the conspirators suffer losses to little purpose.

Finally, if predatory pricing conspiracies are generally unlikely to occur, they are especially so where, as here, the prospects of attaining monopoly power seem slight. In order to recoup their losses, petitioners must obtain enough market power to set higher than competitive prices, and then must sustain those prices long enough to earn in excess profits what they earlier gave up in below-cost prices. See *Northeastern Telephone Co.* v. *American Telephone & Telegraph Co., supra,* at 89; Areeda & Turner, 88 Harv. L. Rev., at 698. Two decades after their conspiracy is alleged to have commenced,[13] petitioners appear to be far from achieving this goal: the two largest shares of the retail market in television sets are held by RCA and respondent Zenith, not by any of the petitioners. 6 App. to Brief for Appellant in No. 81–2331 (CA3), pp. 2575a-2576a. Moreover, those shares, which together approximate 40% of sales, did not decline appreciably during the 1970's. *Ibid.* Petitioners' collective share rose rapidly during this period, from one-fifth or less of the relevant markets to close to 50%. 723 F. 2d, at 316.[14] Neither the District Court nor the Court of Appeals found, however, that petitioners' share presently allows them to charge monopoly prices; to the contrary, respondents contend that the conspiracy is ongoing—that petitioners are still artificially *depressing* the market price in order to drive Zenith out of the market. The data in the record strongly suggests that that goal is yet far distant.[15]

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[13] NUE's complaint alleges that petitioners' conspiracy began as early as 1960; the starting date used in Zenith's complaint is 1953. NUE Complaint ¶ 52; Zenith Complaint ¶ 39.

The alleged conspiracy's failure to achieve its ends in the two decades of its asserted operation is strong evidence that

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[14] During the same period, the number of American firms manufacturing television sets declined from 19 to 13. 5 App. to Brief for Appellant in No. 81-2331 (CA3), p. 1961a. This decline continued a trend that began at least by 1960, when petitioners' sales in the United States market were negligible. *Ibid.* See Zenith Complaint ¶¶35, 37.

[15] Respondents offer no reason to suppose that entry into the relevant market is especially difficult, yet without barriers to entry it would presumably be impossible to maintain supracompetitive prices for an extended time. Judge Easterbrook, commenting on this case in a law review article, offers the following sensible assessment:

"The plaintiffs [in this case] maintain that for the last fifteen years or more at least ten Japanese manufacturers have sold TV sets at less than cost in order to drive United States firms out of business. Such conduct cannot possibly produce profits by harming competition, however. If the Japanese firms drive some United States firms out of business, they could not recoup. Fifteen years of losses could be made up only by very high prices for the indefinite future. (The losses are like investments, which must be recovered with compound interest.) If the defendants should try to raise prices to such a level, they would attract new competition. There are no barriers to entry into electronics, as the proliferation of computer and audio firms shows. The competition would come from resurgent United States firms, from other foreign firms (Korea and many other nations make TV sets), and from defendants themselves. In order to recoup, the Japanese firms would need to suppress competition among themselves. On plaintiffs' theory, the cartel would need to last at least thirty years, far longer than any in history, even when cartels were not illegal. None should be sanguine about the prospects of such a cartel, given each firm's incentive to shave price and expand its share of sales. The predation-recoupment story therefore does not make sense, and we are left with the more plausible inference that the Japanese firms did not sell below cost in the conspiracy does not in fact exist. Since the losses in such a conspiracy accrue before the gains, they must be "repaid" with interest. And because the alleged losses have accrued over the course of two decades, the conspirators could well require a correspondingly long time to recoup. Maintaining supracompetitive prices in turn depends on the continued cooperation of the conspirators, on the inability of other would-be competitors to enter the market, and (not incidentally) on the conspirators' ability to escape antitrust liability for their *minimum* price-fixing cartel.[16] Each of these factors weighs more heavily as the time needed to recoup losses grows. If the losses have been substantial—as would likely be necessary in order to drive out the competition[17]—petitioners would most likely have to sustain their cartel for years simply to break even.

Nor does the possibility that petitioners have obtained supracompetitive profits in the Japanese market change this calculation. Whether or not petitioners have the *means* to sustain substantial losses in this country over a long period of time, they have no *motive* to sustain such losses absent some strong likelihood that the alleged conspiracy in this country will eventually pay off. The courts below found no evidence of any such success, and—as indicated above—the facts actually are to the contrary: RCA and Zenith, not any of the peti-

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the first place. They were just engaged in hard competition." Easterbrook, The Limits of Antitrust, 63 Texas L. Rev. 1, 26–27 (1984) (footnotes omitted).

[16] The alleged predatory scheme makes sense only if petitioners can recoup their losses. In light of the large number of firms involved here, petitioners can achieve this only by engaging in some form of price-fixing *after* they have succeeded in driving competitors from the market. Such price-fixing would, of course, be an independent violation of § 1 of the Sherman Act. *United States* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150 (1940).

[17] The predators' losses must actually *increase* as the conspiracy nears its objective: the greater the predators' market share, the more products the predators sell; but since every sale brings with it a loss, an increase in market share also means an increase in predatory losses.

tioners, continue to hold the largest share of the American retail market in color television sets. More important, there is nothing to suggest any relationship between petitioners' profits in Japan and the amount petitioners could expect to gain from a conspiracy to monopolize the American market. In the absence of any such evidence, the possible existence of supracompetitive profits in Japan simply cannot overcome the economic obstacles to the ultimate success of this alleged predatory conspiracy.[18]

B

In *Monsanto*, we emphasized that courts should not permit factfinders to infer conspiracies when such inferences are implausible, because the effect of such practices is often to deter pro-competitive conduct. *Monsanto*, 465 U. S., at 762–764. Respondents, petitioners' competitors, seek to hold petitioners liable for damages caused by the alleged conspiracy to cut prices. Moreover, they seek to establish this conspiracy indirectly, through evidence of other combinations (such as the check-price agreements and the five-company rule) whose natural tendency is to raise price, and through evidence of rebates and other price-cutting activities that respondents argue tend to prove a combination to suppress prices.[19] But cutting price in order to increase business often is the very essence of competition. Thus, mistaken inferences in cases such as this one are especially costly, because they chill the very conduct the antitrust laws are designed to protect. See *Monsanto, supra*, at 763–764. "[W]e must be concerned lest a rule or precedent that authorizes a search for a particular type of undesirable pricing behavior end up by discouraging legitimate price competition." *Barry Wright Corp.* v. *ITT Grinnell Corp.*, 724 F. 2d 227, 234 (CA1 1983).

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[18] The same is true of any supposed excess production capacity that petitioners may have possessed. The existence of plant capacity that exceeds domestic demand does tend to establish the ability to sell products abroad. It does not, however, provide a motive for selling at prices lower than necessary to obtain sales; nor does it explain why petitioners would be willing to *lose* money in the United States market without some reasonable prospect of recouping their investment.

[19] Respondents also rely on an expert study suggesting that petitioners have sold their products in the American market at substantial losses. The relevant study is not based on actual cost data; rather, it consists of expert opinion based on a mathematical construction that in turn rests on assumptions about petitioners' costs. The District Court analyzed those assumptions in some detail and found them both implausible and inconsistent with record evidence. *Zenith Radio Corp.* v. *Matsushita Electric Industrial Co.*, 505 F. Supp., at 1356–1363. Although the Court of Appeals reversed the District Court's finding that the expert report was inadmissi-

In most cases, this concern must be balanced against the desire that illegal conspiracies be identified and punished. That balance is, however, unusually one-sided in cases such as this one. As we earlier explained, *supra*, at 13–17, predatory pricing schemes require conspirators to suffer losses in order eventually to realize their illegal gains; moreover, the gains depend on a host of uncertainties, making such schemes more likely to fail than to succeed. These economic realities tend to make predatory pricing conspiracies self-deterring: unlike most other conduct that violates the antitrust laws, failed predatory pricing schemes are costly to the conspirators. See Easterbrook, The Limits of Antitrust, 63 Texas L. Rev. 1, 26 (1984). Finally, unlike predatory pricing by a single firm, *successful* predatory pricing conspiracies involving a large number of firms can be identified and punished once they succeed, since some form of minimum price-fixing agreement would be necessary in order to reap the benefits of predation. Thus, there is little reason to be concerned that by granting summary judgment in cases where the evidence of conspiracy is speculative or ambiguous, courts will encourage such conspiracies.

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ble, the court did not disturb the District Court's analysis of the factors that substantially undermine the probative value of that evidence. See 723 F. 2d, at 277–282. We find the District Court's analysis persuasive. Accordingly, in our view the expert opinion evidence of below-cost pricing has little probative value in comparison with the economic factors, discussed in Part IV–A, *supra*, that suggest that such conduct is irrational.

V

As our discussion in part IV, A shows, petitioners had no motive to enter into the alleged conspiracy. To the contrary, as presumably rational businesses, petitioners had every incentive *not* to engage in the conduct with which they are charged, for its likely effect would be to generate losses for petitioners with no corresponding gains. Cf. *Cities Service*, 391 U. S., at 279. The Court of Appeals did not take account of the absence of a plausible motive to enter into the alleged predatory pricing conspiracy. It focused instead on whether there was "direct evidence of concert of action." 723 F. 2d, at 304. The Court of Appeals erred in two respects: (i) the "direct evidence" on which the court relied had little, if any, relevance to the alleged predatory pricing conspiracy; and (ii) the court failed to consider the absence of a plausible motive to engage in predatory pricing.

The "direct evidence" on which the court relied was evidence of *other* combinations, not of a predatory pricing conspiracy. Evidence that petitioners conspired to raise prices in Japan provides little, if any, support for respondents' claims: a conspiracy to increase profits in one market does not tend to show a conspiracy to sustain losses in another. Evidence that petitioners agreed to fix *minimum* prices (through the "check price" agreements) for the American market actually works in petitioners' favor, because it suggests that petitioners were seeking to place a floor under prices rather than to lower them. The same is true of evidence that petitioners agreed to limit the number of distributors of their products in the American market—the so-called "Five Company Rule." That practice may have facilitated a horizontal territorial allocation, see *United States* v. *Topco Associates, Inc.*, 405 U. S. 596 (1972), but its natural effect would be to raise market prices rather than reduce them.[20]

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[20] The Court of Appeals correctly reasoned that the Five Company Rule might tend to insulate petitioners from competition with each other. 723 F. 2d, at 306. But this effect is irrelevant to a conspiracy to price preda-

Evidence that tends to support any of these collateral conspiracies thus says little, if anything, about the existence of a conspiracy to charge below-market prices in the American market over a period of two decades.

That being the case, the absence of any plausible motive to engage in the conduct charged is highly relevant to whether a "genuine issue for trial" exists within the meaning of Rule 56(e). Lack of motive bears on the range of permissible conclusions that might be drawn from ambiguous evidence: if petitioners had no rational economic motive to conspire, and if their conduct is consistent with other, equally plausible explanations, the conduct does not give rise to an inference of conspiracy. See *Cities Service*, *supra*, at 278–280. Here, the conduct in question consists largely of (i) pricing at levels that succeeded in taking business away from respondents, and (ii) arrangements that may have limited petitioners' ability to compete with each other (and thus kept prices from going even lower). This conduct suggests either that petitioners behaved competitively, or that petitioners conspired to *raise* prices. Neither possibility is consistent with an agreement among 21 companies to price below market levels. Moreover, the predatory pricing scheme that this conduct is said to prove is one that makes no practical sense: it calls for petitioners to destroy companies larger and better established than themselves, a goal that remains far distant more than two decades after the conspiracy's birth. Even had

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torily. Petitioners have no incentive to underprice each other if they already are pricing *below* the level at which they could sell their goods. The far more plausible inference from a customer allocation agreement such as the Five Company Rule is that petitioners were conspiring to *raise* prices, by limiting their ability to take sales away from each other. Respondents—petitioners' competitors—suffer no harm from a conspiracy to raise prices. *Supra*, at 7. Moreover, it seems very unlikely that the Five Company Rule had any significant effect of any kind, since the "rule" permitted petitioners to sell to their American subsidiaries, and did not limit the number of distributors to which the subsidiaries could resell. 513 F. Supp., at 1190.

they succeeded in obtaining their monopoly, there is nothing in the record to suggest that they could recover the losses they would need to sustain along the way. In sum, in light of the absence of any rational motive to conspire, neither petitioners' pricing practices, nor their conduct in the Japanese market, nor their agreements respecting prices and distribution in the American market, suffice to create a "genuine issue for trial." Fed. Rule Civ. Proc. 56(e).[21]

On remand, the Court of Appeals is free to consider whether there is other evidence that is sufficiently unambiguous to permit a trier of fact to find that petitioners conspired to price predatorily for two decades despite the absence of any apparent motive to do so. The evidence must "tend[] to exclude the possibility" that petitioners underpriced respondents to compete for business rather than to implement an economically senseless conspiracy. *Monsanto*, 465 U. S., at 764. In the absence of such evidence, there is no "genuine issue for trial" under Rule 56(e), and petitioners are entitled to have summary judgment reinstated.

VI

Our decision makes it unnecessary to reach the sovereign compulsion issue. The heart of petitioners' argument on that issue is that MITI, an agency of the Government of Japan, required petitioners to fix minimum prices for export to the United States, and that petitioners are therefore immune from antitrust liability for any scheme of which those minimum prices were an integral part. As we discussed in part II, *supra*, respondents could not have suffered a cognizable injury from any action that *raised* prices in the American CEP market. If liable at all, petitioners are liable for conduct that is distinct from the check price agreements. The sovereign compulsion question that both petitioners and the Solicitor General urge us to decide thus is not presented here.

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[21] We do not imply that, if petitioners had had a plausible reason to conspire, ambiguous conduct could suffice to create a triable issue of conspiracy. Our decision in *Monsanto Co.* v. *Spray-Rite Service Corp.*, 465 U. S. 752 (1984), establishes that conduct that is as consistent with permissible competition as with illegal conspiracy does not, without more, support even an inference of conspiracy. *Id.*, at 763-764. See *supra*, at 12.

The decision of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

SUPREME COURT OF THE UNITED STATES

No. 83–2004

MATSUSHITA ELECTRIC INDUSTRIAL CO., LTD., ET AL., PETITIONERS *v.* ZENITH RADIO CORPORATION ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

[March 26, 1986]

JUSTICE WHITE, with whom JUSTICE BRENNAN, JUSTICE BLACKMUN, and JUSTICE STEVENS join, dissenting.

It is indeed remarkable that the Court, in the face of the long and careful opinion of the Court of Appeals, reaches the result it does. The Court of Appeals faithfully followed the relevant precedents, including *First National Bank of Arizona* v. *Cities Service Co.*, 391 U. S. 253 (1968), and *Monsanto Co.* v. *Spray-Rite Service Corp.*, 465 U. S. 752 (1984), and it kept firmly in mind the principle that proof of a conspiracy should not be fragmented, see *Continental Ore Co.* v. *Union Carbide & Carbon Corp.*, 370 U. S. 690, 699 (1962). After surveying the massive record, including very significant evidence that the District Court erroneously had excluded, the Court of Appeals concluded that the evidence taken as a whole creates a genuine issue of fact whether petitioners engaged in a conspiracy in violation of §§1 and 2 of the Sherman Act, and §2(a) of the Robinson-Patman Act. In my view, the Court of Appeals' opinion more than adequately supports this judgment.

The Court's opinion today, far from identifying reversible error, only muddies the waters. In the first place, the Court makes confusing and inconsistent statements about the appropriate standard for granting summary judgment. Second, the Court makes a number of assumptions that invade the factfinder's province. Third, the Court faults the Third Circuit for nonexistent errors and remands the case although it is plain that respondents' evidence raises genuine issues of material fact.

I

The Court's initial discussion of summary judgment standards appears consistent with settled doctrine. I agree that "[w]here the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no 'genuine issue for trial.'" *Ante*, at 11 (quoting *Cities Service, supra*, at 289). I also agree that "'[o]n summary judgment the inferences to be drawn from the underlying facts . . . must be viewed in the light most favorable to the party opposing the motion.'" *Ante*, at 12 (quoting *United States* v. *Diebold, Inc.*, 369 U. S. 654, 655 (1962)). But other language in the Court's opinion suggests a departure from traditional summary judgment doctrine. Thus, the Court gives the following critique of the Third Circuit's opinion:

> "[T]he Court of Appeals concluded that a reasonable factfinder could find a conspiracy to depress prices in the American market in order to drive out American competitors, which conspiracy was funded by excess profits obtained in the Japanese market. The court apparently did not consider whether it was as plausible to conclude that petitioners' price-cutting behavior was independent and not conspiratorial." *Ante*, at 6.

In a similar vein, the Court summarizes *Monsanto* v. *Spray-Rite Corp., supra*, as holding that "courts should not permit factfinders to infer conspiracies when such inferences are implausible . . . ." *Ante*, at 18. Such language suggests that a judge hearing a defendant's motion for summary judgment in an antitrust case should go beyond the traditional summary judgment inquiry and decide for himself whether the weight of the evidence favors the plaintiff. *Cities Service* and *Monsanto* do not stand for any such proposition. Each of those cases simply held that a particular piece of evidence standing alone was insufficiently probative to justify sending a case to the jury.[1] These holdings in no way undermine the doctrine that all evidence must be construed in the light most favorable to the party opposing summary judgment.

If the Court intends to give every judge hearing a motion for summary judgment in an antitrust case the job of determining if the evidence makes the inference of conspiracy more probable than not, it is overturning settled law. If the Court does not intend such a pronouncement, it should refrain from using unnecessarily broad and confusing language.

II

In defining what respondents must show in order to recover, the Court makes assumptions that invade the factfinder's province. The Court states with very little discussion that respondents can recover under § 1 of the Sherman Act only if they prove that "petitioners conspired to drive respondents out of the relevant markets by (i) pricing below the level necessary to sell their products, or (ii) pricing below some appropriate measure of cost." *Ante*, at 9, n. 8. This statement is premised on the assumption that "[a]n agreement without these features would either leave respondents in the same position as would market forces or would actually benefit respondents by raising market prices." *Ibid.* In making this assumption, the Court ignores the contrary conclusions of respondents' expert DePodwin, whose report in very relevant part was erroneously excluded by the District Court.

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[1] The Court adequately summarizes the quite fact-specific holding in *Cities Service*. *Ante*, at 11–12.

In *Monsanto*, the Court held that a manufacturer's termination of a price-cutting distributor after receiving a complaint from another distributor is not, *standing alone*, sufficient to create a jury question. 465 U. S., at 763–764. To understand this holding, it is important to realize that under *United States* v. *Colgate & Co.*, 250 U. S. 300 (1919), it is permissible for a manufacturer to announce retail prices in advance and terminate those who fail to comply, but that under *Dr. Miles Medical Co.* v. *John D. Park & Sons Co.*, 220 U. S. 373 (1911), it is impermissible for the manufacturer and its distributors to agree on the price at which the distributors will sell the goods. Thus, a manufacturer's termination of a price-cutting distributor after receiving a complaint from another distributor is lawful under *Colgate*, *unless* the termination is pursuant to a shared understanding between the manufacturer and its distributors respecting enforcement of a resale price maintenance scheme. *Monsanto* holds that to establish liability under *Dr. Miles*, more is needed than evidence of behavior that is consistent with a distributor's exercise of its prerogatives under *Colgate*. Thus, "[t]here must be evidence that tends to exclude the possibility that the manufacturer and nonterminated distributors were acting independently." 465 U. S., at 764. *Monsanto* does *not* hold that if a terminated dealer produces some further evidence of conspiracy beyond the bare fact of post-complaint termination, the judge hearing a motion for summary judgment should balance all the evidence pointing toward conspiracy against all the evidence pointing toward independent action.

The DePodwin Report, on which the Court of Appeals relied along with other material, indicates that respondents were harmed in two ways that are independent of whether petitioners priced their products below "the level necessary to sell their products or . . . some appropriate measure of cost." *Ibid.* First, the Report explains that the price-raising scheme in Japan resulted in lower consumption of petitioners' goods in that country and the exporting of more of petitioners' goods to this country than would have occurred had prices in Japan been at the competitive level. Increasing exports to this country resulted in depressed prices here, which harmed respondents.[2] Second, the DePodwin Report

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[2] Dr. DePodwin summarizes his view of the harm caused by Japanese cartelization as follows:

"When we consider the injuries inflicted on United States producers, we must again look at the Japanese television manufacturers' export agreement as part of a generally collusive scheme embracing the Japanese domestic market as well. This scheme increased the supply of television receivers to the United States market while restricting supply in the Japanese market. If the Japanese manufacturers had competed in both domestic and export markets, they would have sold more in the domestic market and less in the United States. A greater proportion of Japanese production capacity would have been devoted to domestic sales. Domestic indicates that petitioners exchanged confidential proprietary information and entered into agreements such as the five-company rule with the goal of avoiding intragroup competition in the United States market. The Report explains that petitioners' restrictions on intragroup competition caused respondents to lose business that they would not have lost had petitioners competed with one another.[3]

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prices would have been lower and export prices would have been higher. The size of the price differential between domestic and export markets would have diminished practically to the vanishing point. Consequently, competition among Japanese producers in both markets would have resulted in reducing exports to the United States and United States prices would have risen. In addition, investment by the United States industry would have increased. As it was, however, the influx of sets at depressed prices cut the rates of return on television receiver production facilities in the United States to so low a level as to make such investment uneconomic.

"We can therefore conclude that the American manufacturers of television receivers would have made larger sales at higher prices in the absence of the Japanese cartel agreements. Thus, the collusive behavior of Japanese television manufacturers resulted in a very severe injury to those American television manufacturers, particularly to National Union Electric Corporation, which produced a preponderance of television sets with screen sizes of nineteen inches and lower, especially those in the lower range of prices." 5 App. to Brief for Appellants in No. 81–2331 (CA3), pp. 1629a-1630a.

[3] The DePodwin Report has this, among other things, to say in summarizing the harm to respondents caused by the five-company rule, exchange of production data, price coordination, and other allegedly anti-competitive practices of petitioners:

"The impact of Japanese anti-competitive practices on United States manufacturers is evident when one considers the nature of competition. When a market is fully competitive, firms pit their resources against one another in an attempt to secure the business of individual customers. However, when firms collude, they violate a basic tenet of competitive behavior, i. e., that they act independently. United States firms were confronted with Japanese competitors who collusively were seeking to destroy their established customer relationships. Each Japanese company had targeted customers which it could service with reasonable assurance that its fellow Japanese cartel members would not become involved. But just as importantly, each Japanese firm would be assured that what was already a low price level for Japanese television receivers in the United

The DePodwin Report alone creates a genuine factual issue regarding the harm to respondents caused by Japanese cartelization and by agreements restricting competition among petitioners in this country. No doubt the Court prefers its own economic theorizing to Dr. DePodwin's, but that is not a reason to deny the factfinder an opportunity to consider Dr. DePodwin's views on how petitioners' alleged collusion harmed respondents.[4]

The Court, in discussing the unlikelihood of a predatory conspiracy, also consistently assumes that petitioners valued

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States market would not be further depressed by the actions of its Japanese associates.

"The result was a phenomenal growth in exports, particularly to the United States. Concurrently, Japanese manufacturers, and the defendants in particular, made large investments in new plant and equipment and expanded production capacity. It is obvious, therefore, that the effect of the Japanese cartel's concerted actions was to generate a larger volume of investment in the Japanese television industry than would otherwise have been the case. This added capacity both enabled and encouraged the Japanese to penetrate the United States market more deeply than they would have had they competed lawfully." 5 App. to Brief for Appellant in No. 81–2331 (CA3), pp. 1628a–1629a.

For a more complete statement of DePodwin's explanation of how the alleged cartel operated, and the harms it caused respondents, see 5 *id.*, at 1609a–1642a. This material is summarized in a chart found at 5 *id.*, at 1633a.

[4] In holding that Parts IV and V of the Report had been improperly excluded, the Court of Appeals said:

"The trial court found that DePodwin did not use economic expertise in reaching the opinion that the defendants participated in a Japanese television cartel. 505 F. Supp. at 1342–46. We have examined the excluded portions of Parts IV and V in light of the admitted portions, and we conclude that this finding is clearly erroneous. As a result, the court also held the opinions to be unhelpful to the factfinder. What the court in effect did was to eliminate all parts of the report in which the expert economist, after describing the conditions in the respective markets, the opportunities for collusion, the evidence pointing to collusion, the terms of certain undisputed agreements, and the market behavior, expressed the opinion that there was concert of action consistent with plaintiffs' conspiracy theory. Considering the complexity of the economic issues involved, it simply can-profit-maximization over growth. See, *e.g.*, *ante* at 20. In light of the evidence that petitioners sold their goods in this country at substantial losses over a long period of time, see Part III-B, *infra*, I believe that this is an assumption that should be argued to the factfinder, not decided by the Court.

III

In reversing the Third Circuit's judgment, the Court identifies two alleged errors: "(i) [T]he 'direct evidence on which the [Court of Appeals] relied had little, if any, relevance to the alleged predatory pricing conspiracy, and (ii) the court failed to consider the absence of a plausible motive to engage in predatory pricing." *Ante*, at 20. The Court's position is without substance.

A

The first claim of error is that the Third Circuit treated evidence regarding price-fixing in Japan and the so-called five-company rule and check prices as "'direct evidence' of a conspiracy that injured respondents." *Ante*, at 8 (citing *In re Japanese Electronics Products Antitrust Litigation*, 723 F. 2d 238, 304–305 (1983)). The passage from the Third Circuit's opinion in which the Court locates this alleged error makes what I consider to be a quite simple and correct observation, namely, that this case is distinguishable from traditional "conscious parallelism" cases, in that there is direct evidence of concert of action among petitioners. *Id.*, at 304–305. The Third Circuit did not, as the Court implies, jump unthinkingly from this observation to the conclusion that evidence regarding the five-company rule could support

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not be said that such an opinion would not help the trier of fact to understand the evidence or determine that fact in issue." *In re Japanese Electronics Products Antitrust Litigation*, 723 F. 2d 238, 280 (1983).

The Court of Appeals had similar views about Parts VI and VII.

a finding of antitrust injury to respondents.[5] The Third Circuit twice specifically noted that horizontal agreements allocating customers, though illegal, do not ordinarily injure competitors of the agreeing parties. *Id.*, at 306, 310–311. However, after reviewing evidence of cartel activity in Japan, collusive establishment of dumping prices in this country, and long-term, below-cost sales, the Third Circuit held that a factfinder could reasonably conclude that the five-company rule was not a simple price-raising device:

> "[A] factfinder might reasonably infer that the allocation of customers in the United States, combined with price-fixing in Japan, was intended to permit concentration of the effects of dumping upon American competitors while eliminating competition among the Japanese manufacturers in either market." *Id.*, at 311.

I see nothing erroneous in this reasoning.

B

The Court's second charge of error is that the Third Circuit was not sufficiently skeptical of respondents' allegation that petitioners engaged in predatory pricing conspiracy. But the Third Circuit is not required to engage in academic discussions about predation; it is required to decide whether respondents' evidence creates a genuine issue of material fact. The Third Circuit did its job, and remanding the case so that it can do the same job again is simply pointless.

The Third Circuit indicated that it considers respondents' evidence sufficient to create a genuine factual issue regarding long-term, below-cost sales by petitioners. *Ibid.* The

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[5] I use the Third Circuit's analysis of the five-company rule by way of example; the court did an equally careful analysis of the parts the cartel activity in Japan and the check prices could have played in an actionable conspiracy. See generally *id.*, at 303–311.

In discussing the five-company rule, I do not mean to imply any conclusion on the validity of petitioner's sovereign compulsion defense. Since the Court does not reach this issue, I see no need of my addressing it.

Court tries to whittle away at this conclusion by suggesting that the "expert opinion evidence of below-cost pricing has little probative value in comparison with the economic factors . . . that suggest that such conduct is irrational." *Ante*, at 19, n. 19. But the question is not whether the Court finds respondents' experts persuasive, or prefers the District Court's analysis; it is whether, viewing the evidence in the light most favorable to respondents, a jury or other factfinder could reasonably conclude that petitioners engaged in long-term below-cost sales. I agree with the Third Circuit that the answer to this question is yes.

It is misleading for the Court to state that the Court of Appeals "did not disturb the District Court's analysis of the factors that substantially undermine the probative value of [evidence in the DePodwin Report respecting below-cost sales]." *Ibid.* The Third Circuit held that the exclusion of the portion of the DePodwin Report regarding below-cost pricing was erroneous because "the trial court ignored DePodwin's uncontradicted affidavit that all data relied on in his report were of the type on which experts in his field would reasonably rely." 723 F. 2d, at 282. In short, the Third Circuit found DePodwin's affidavit sufficient to create a genuine factual issue regarding the correctness of his conclusion that petitioners sold below cost over a long period of time. Having made this determination, the court saw no need—nor do I—to address the District Court's analysis point by point. The District Court's criticisms of DePodwin's methods are arguments that a factfinder should consider.

IV

Because I believe that the Third Circuit was correct in holding that respondents have demonstrated the existence of genuine issues of material fact, I would affirm the judgment below and remand this case for trial.

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0 3 (Slip Opinion)

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Lumber Co.*, 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

UNITED STATES *v.* LANE ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 84-744. Argued October 9, 1985—Decided January 27, 1986*

James Lane and his son Dennis, respondents in No. 84-744, were indicted on counts for, *inter alia*, mail fraud in connection with insurance claims that were made and that insurers paid for fire damage to a restaurant and duplex that James had hired a professional arsonist to burn. The restaurant was operated by James in partnership with others. Count 1 charged James with mail fraud with regard to that fire. The duplex was owned by a different partnership, of which Dennis was one of the partners. Counts 2 through 4 charged both respondents with mail fraud related to the duplex fire. Count 5 charged both respondents with conspiracy to commit mail fraud in connection with a third arson scheme, and Count 6 charged Dennis with perjury before the grand jury. The Federal District Court denied respondents' pretrial motions for severance on the alleged ground that the charged offenses were misjoined in violation of Federal Rule of Criminal Procedure 8(b), which provides that two or more defendants may be charged in the same indictment if they are alleged to have participated "in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses." The trial then proceeded jointly before a jury. When evidence relating to the restaurant fire was admitted, the court instructed the jury not to consider that evidence against Dennis, and repeated this instruction in the final charge and admonished the jury to consider each count and defendant separately. The jury returned convictions on all counts. The Court of Appeals reversed and remanded for new trials, holding that the joinder of Count 1 with the other five counts violated Rule 8(b) and that such misjoinder was prejudicial *per se*. The court,

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*Together with No. 84-963, *Lane et al.* v. *United States*, also on certiorari to the same court.

ORIGINAL

Syllabus

however, rejected respondents' contention that there was insufficient evidence to support convictions under Counts 2 through 4 because each charged mailing occurred after each related insurance payment had been received and thus after each scheme to defraud had reached fruition.

Held:

1. Misjoinder under Rule 8(b) is subject to harmless-error analysis and is not reversible error *per se*. An error involving misjoinder "affects substantial rights" and requires retrial only if the misjoinder results in actual prejudice because it "had substantial and injurious effect or influence in determining the jury's verdict." *Kotteakos* v. *United States*, 328 U. S. 750, 776. It is only by such a holding that Rule 8(b) and Federal Rule of Criminal Procedure 52(a)—which provides that any error "which does not affect substantial rights shall be disregarded"—can be brought in substantial harmony. Here, in the face of overwhelming evidence of guilt, the claimed error was harmless. The District Court provided proper limiting jury instructions, and, moreover, the same evidence on Count 1 would likely have been admissible on joint retrial of the other counts to show James' intent under Federal Rule of Evidence 404(b). Any error therefore failed to have any "substantial influence" on the verdict. Pp. 5–12.

2. There was sufficient evidence to support the convictions on Counts 2 through 4. On the evidence and under proper instructions, the jury could properly find that the mailings charged in Counts 2 and 3 took place while the overall scheme charged in the indictment was still continuing and that the scheme was not completed until after the mailing charged in Count 4, because that mailing, as were the others, was intended to "lull" the insurer into a false sense of security. Pp. 12–15.

735 F. 2d 799, affirmed in part, reversed in part, and remanded.

BURGER, C. J., delivered the opinion of the Court, in which WHITE, POWELL, REHNQUIST, and O'CONNOR, JJ., joined, and in Part III of which BRENNAN, MARSHALL, BLACKMUN, and STEVENS, JJ., joined. BRENNAN, J., filed an opinion concurring in part and dissenting in part, in which BLACKMUN, J., joined. STEVENS, J., filed an opinion concurring in part and dissenting in part, in which MARSHALL, J., joined.

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D. C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

Nos. 84–744 AND 84–963

UNITED STATES, PETITIONER
84–744 *v.*
JAMES C. LANE AND DENNIS R. LANE

JAMES C. LANE AND DENNIS R. LANE, PETITIONER
84–963 *v.*
UNITED STATES

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

[January 27, 1986]

CHIEF JUSTICE BURGER delivered the opinion of the Court.

We granted certiorari to resolve a conflict among the Circuits as to whether a misjoinder under Rule 8 of the Federal Rules of Criminal Procedure is subject to the harmless-error rule,[1] and to determine whether there is sufficient evidence

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[1] Six Circuits have adopted a *per se* approach holding that misjoinder is always reversible error. See *United States* v. *Turkette*, 632 F. 2d 896, 906, and n. 35 (CA1 1980), rev'd on other grounds, 452 U. S. 576 (1981); *United States* v. *Graci*, 504 F. 2d 411, 414 (CA3 1974); *United States* v. *Bova*, 493 F. 2d 33 (CA5 1974); *United States* v. *Bledsoe*, 674 F. 2d 647, 654, 657–658 (CA8), cert. denied *sub nom. Phillips* v. *United States*, 459 U. S. 1040 (1982); *United States* v. *Eagleston*, 417 F. 2d 11, 14 (CA10 1969); *United States* v. *Ellis*, 709 F. 2d 688, 690 (CA11 1983).

Six have subjected misjoinder claims to harmless-error analysis. See *United States* v. *Ajlouny*, 629 F. 2d 830, 843 (CA2 1980), cert. denied, 449 U. S. 1111 (1981); *United States* v. *Seidel*, 620 F. 2d 1006 (CA4 1980); *United States* v. *Hatcher*, 680 F. 2d 438, 442 (CA6 1982); *United States* v. *Varelli*, 407 F. 2d 735, 747–748 (CA7 1969); *United States* v. *Martin*, 567 F. 2d 849, 854 (CA9 1977); *Baker* v. *United States*, 131 U. S. App. D.C. 7, in this case to support convictions for mail fraud under 18 U. S. C. § 1341.

I

A

James Lane and three partners opened the El Toro Restaurant in Amarillo, Texas, in the summer of 1978. The business never operated at a profit, however, and sales began to decline that fall. In November, Lane purchased fire insurance covering the building's contents and improvements and any related business losses. Simultaneously, he hired Sidney Heard, a professional arsonist, to burn the building in order to escape the lease and partnership. On February 27, 1979, Heard set a fire that caused smoke damage to the building's contents. Lane first settled with the insurer on the contents and improvements. He then submitted an income statement that falsely indicated the restaurant had operated at a profit. After the insurance adjuster mailed the statement to the insurer's headquarters, Lane settled his business interruption claim.

In early 1980, Lane again hired Heard to set fire to a duplex that Lane was moving to a vacant lot in Amarillo. Lane obtained a fire insurance policy on the building, listing the owner as L & L Properties, a partnership between his son Dennis Lane and Andrew Lawson. An accomplice of Heard's burned the duplex on May 1, 1980.

Thereafter, on three occasions Dennis Lane signed proof-of-loss claims for repairs and submitted them to an insurance adjuster, who issued drafts in return totaling $12,000.[2] Each time, the adjuster later mailed the proof-of-loss to the insurer's headquarters. The adjuster issued a final settle-

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21–23, 401 F. 2d 958, 972–974 (1968). Most of these courts had previously taken the view that misjoinder is prejudicial *per se*.

[2] Each proof-of-loss form stated that the "loss did not originate by any act, design or procurement on the part of your insured or this affiant" and that "no attempt to deceive [the] company as to the extent of the loss has been made."

ment draft for $12,250 on September 16, 1980. Two days later, he mailed a memorandum to headquarters explaining why repairs had exceeded previous estimates by some $10,000. He enclosed invoices supplied by Dennis Lane listing various materials and furniture purportedly purchased to repair and refurbish the duplex. In fact, these invoices had been fabricated by James Lane, Heard, and Heard's secretary.

The Lanes and Lawson met with Heard several weeks after the duplex fire to discuss a proposal to establish and burn a flower shop in Lubbock, Texas. Heard and Dennis Lane picked out a suitable building in July 1980, and an accomplice of Heard's, William Lankford, prepared ficticious invoices for merchandise and delivered some artificial flowers to the building later in August. In November James Lane insured the contents for $50,000. Heard, however, was later arrested for an unrelated crime and the planned arson never took place.

In March 1981, an Amarillo newspaper article connected Dennis Lane with a scheme to burn the flower shop with Heard; that same day, James Lane canceled the insurance policy. On May 12, 1981, Dennis Lane appeared before a federal grand jury investigating Heard. He testified that Heard had nothing to do with the flower shop or with his own dealings with Lankford.

B

James Lane and Dennis Lane were indicted in multiple counts for mail fraud in violation of 18 U. S. C. § 1341, conspiracy in violation of 18 U. S. C. § 371, and perjury in violation of 18 U. S. C. § 1623. Count 1 charged James Lane with mail fraud with regard to the El Toro Restaurant fire. Counts 2 through 4 charged both Lanes with mail fraud related to the duplex fire, and Count 5 charged them with conspiracy to commit mail fraud in connection with the flower shop arson plan. In Count 6, Dennis Lane was charged with perjury before the grand jury.

Prior to trial in the District Court for the Northern District of Texas, the Lanes filed motions for severance contending that the charged offenses were misjoined in violation of Federal Rule of Criminal Procedure 8(b), but the motions were denied and the trial proceeded jointly before a jury. When evidence relating to the El Toro Restaurant fire was admitted, the trial court instructed the jury not to consider that evidence against Dennis Lane. App. 21. The trial judge repeated this instruction in the final charge, together with an instruction regarding the separate consideration to be given each defendant and each count. *Ibid.* The Lanes renewed their severance motions at the end of the Government's evidence and at the close of all evidence, but the motions were again denied. The jury returned convictions on all counts.

On appeal, the Lanes argued that misjoinder under Rule 8(b) had occurred.[3] The Court of Appeals for the Fifth Circuit concluded that Counts 2 through 6 were properly joined, but agreed "that Count 1 should not have been joined with the others because it was not part of the same series of acts or transactions as Counts 2 through 6." 735 F. 2d 799, 803–804 (1984). The court refused to consider the Government's argument that the error, if any, was harmless, stating only that "Rule 8(b) misjoinder is prejudicial *per se* in this circuit." *Id.*, at 806 (citing *United States* v. *Levine*, 546 F. 2d 658 (CA5 1977)). The court reversed the Lanes' convictions and remanded for new trials.

At the same time, the Court of Appeals rejected the Lanes' contention that there was insufficient evidence to support convictions for mail fraud under Counts 2 through 4 because each charged mailing occurred *after* each related payment had been received, and thus after each scheme had reached fruition.[4] The Court of Appeals distinguished our holding in *United States* v. *Maze*, 414 U. S. 395 (1974), and instead relied on *United States* v. *Sampson*, 371 U. S. 75 (1962), to hold that mailings occurring after receipt of an insurance payment may nevertheless be "in execution of fraud" as required by 18 U. S. C. § 1341 where they are "designed to lull the victims into a false sense of security and postpone investigation." 735 F. 2d, at 807–808.

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[3] Rule 8(b) provides:

"(b) Joinder of Defendants. Two or more defendants may be charged in the same indictment or information if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses. Such defendants may be charged in one or more counts together or separately and all of the defendants need not be charged in each count."

The court found sufficient evidence for the properly instructed jury to "infer that the mailings were intended to and did have a lulling effect" because they helped persuade the insurer that "the claims were legitimate." *Id.*, at 808. It emphasized that had the proof-of-loss forms not been mailed shortly after issuance of the insurance drafts, the insurer might have been alerted to the possibility of a fraud. *Ibid.* Similarly, the false invoices submitted by Dennis Lane "gave the impression of a perfectly innocent claim." *Ibid.*

The Government's petition for rehearing was denied. 741 F. 2d 1381 (1984). We granted certiorari, 469 U. S. —— (1985). We reverse in part and affirm in part.

II

The Court of Appeals held that misjoinder "is inherently prejudicial."[5] 735 F. 2d, at 804. The Circuits are divided on the question whether misjoinder requires automatic reversal, or whether the harmless-error rule governs.[6] Most Circuits that have adopted the *per se* approach have relied on *McElroy* v. *United States*, 164 U. S. 76 (1896), where this

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[4] The Court of Appeals also rejected James Lane's challenge to the sufficiency of the evidence with regard to Count 1. That holding was not challenged in the Lanes' cross-petition.

[5] Although the Government continues to believe that Count 1 was properly joined with Counts 2 through 6, it does not challenge that holding here.

[6] See n. 1, *supra*.

Court applied the joinder statute then in force and reversed convictions of jointly tried defendants after rejecting the Government's argument that there was no showing of prejudice. *Id.*, at 81.

McElroy, however, was decided long before the adoption of Federal Rules of Criminal Procedure 8 and 52, and prior to the enactment of the "harmless error" statute, 28 U. S. C. §2111, which provides that on appeal we are to ignore "errors or defects which do not affect the substantial rights of the parties." Under Rule 52(a), we are similarly instructed that any error "which does not affect substantial rights shall be disregarded."[7]

The Court's holding in *Chapman* v. *California*, 386 U. S. 18 (1967), made a significant change in the law of harmless error. There, Justice Black, speaking for the Court, emphasized that even "some constitutional errors [may] be deemed harmless, not requiring the automatic reversal of the conviction." *Id.*, at 22. In rejecting the automatic reversal rule, the Court stated:

> "We are urged by petitioners to hold that all federal constitutional errors, regardless of the facts and circumstances, must always be deemed harmful. . . . *We decline to adopt any such rule.*" *Id.*, at 21–22 (emphasis added).

Justice Black went on to note that all 50 States follow the harmless-error approach, and

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[7] The dissent argues that *McElroy* conclusively determined misjoinder is prejudicial *per se*, and that Rule 8 was intended to represent a restatement of existing law, including the "rule of the *McElroy* case." *Post*, at 3. Rule 8, however, is simply a procedural rule with certain technical requirements, and the dissenting opinion refers to the Advisory Committee on Rule's citation of *McElroy*, see *post*, at ——, n. 3, making clear they were referring only to those *technical* requirements of prior law. Nowhere is there any indication Rule 8 was intended to enshrine any substantive "principle" of *McElroy* that misjoinder requires reversal, nor is there any citation of *McElroy*'s specific holding.

> "the United States long ago through its Congress established . . . the rule that judgments shall not be reversed for 'errors or defects which do not affect the substantial rights of the parties.' 28 U. S. C. § 2111. None of these rules on its face distinguishes between federal constitutional errors and errors of state law or federal statutes and rules." *Id.*, at 22 (footnote omitted).

Since *Chapman*, we have "consistently made clear that it is the duty of a reviewing court to consider the trial record as a whole and to ignore errors that are harmless, including most constitutional violations." *United States* v. *Hasting*, 461 U. S. 499, 509 (1983). In *Hasting*, we again emphasized that

> "given the myriad safeguards provided to assure a fair trial, and taking into account the reality of the human fallibility of the participants, there can be no such thing as an error-free, perfect trial, and . . . the Constitution does not guarantee such a trial." *Id.*, at 508–509.

In this case, the argument for applying harmless-error analysis is even stronger because the specific joinder standards of Rule 8 are not themselves of constitutional magnitude.[8] Clearly, *Chapman* and *Hasting* dictate that the harmless-error rule governs here.[9]

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[8] Improper joinder does not, in itself, violate the Constitution. Rather, misjoinder would rise to the level of a constitutional violation only if it results in prejudice so great as to deny a defendant his Fifth Amendment right to a fair trial.

[9] The dissent suggests *Chapman* is irrelevant to our analysis because that case involved a *constitutional* violation, whereas the error here is of a nonconstitutional nature. *Post*, at 8. It is difficult to see any logic in the argument that although the harmless-error rule may be applicable to *constitutional* violations, it should not be applied to violations of mere procedural rules. The dissent recognizes that the standard for harmless-error analysis adopted in *Chapman* concerning constitutional errors is considerably more onerous than the standard for nonconstitutional errors adopted in *Kotteakos* v. *United States*, 328 U. S. 750 (1946). See *post*, at 8, n. 11. The heightened regard we have for constitutional protections surely war-

The applicability of harmless error to misjoinder also follows from *Kotteakos* v. *United States*, 328 U. S. 750 (1946), a case similar to the one at hand. There, some 32 defendants were charged with one conspiracy, when in fact there had been at least eight separate conspiracies. Nineteen defendants were jointly tried, and seven were convicted. The Court applied the harmless-error statute to an error resulting from a variance from the indictment, and held the error was not harmless in that case. Emphasizing the numerous conspiracies involving unrelated defendants, as well as seriously flawed jury instructions, the *Kotteakos* Court reversed the convictions in light of each of the 32 defendants' "right not to be tried *en masse* for the conglomeration of distinct and separate offenses" involved. *Id.*, at 775.

Although the Court's review in that case was from the perspective of a variance from the indictment, rather than misjoinder, the Court recognized that misjoinder was implicated, and suggested that the harmless-error rule could similarly apply in that context.[10] *Id.*, at 774–775.

A holding directly involving misjoinder again indicated the harmless-error rule should apply. In *Schaffer* v. *United States*, 362 U. S. 511 (1960), three different groups of defendants were charged with participating in separate criminal acts with one other group of three defendants. The indictment also charged all the defendants with one overall count of conspiracy, making joinder under Rule 8 proper. At the close of the Government's case, however, the District Court concluded there was insufficient evidence of conspiracy and dismissed that count. The court then denied a motion for

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rants a conclusion that nonconstitutional provisions must be treated at least comparably, and in *Hasting* we emphasized even "most constitutional violations" must be ignored if they are harmless. 461 U. S., at 509.

[10] The Court pointed out that "the problem is not merely one of variance . . . but is also essentially one of proper joinder." 328 U. S., at 774. Even so, the Court indicated the harmless-error rule must apply, although perhaps with "restraint." *Id.*, at 775.

severance after concluding that defendants failed to show prejudice from the joint trial; the Court of Appeals affirmed. This Court recognized that "the charge which originally justified joinder turn[ed] out to lack the support of sufficient evidence." *Id.*, at 516. Essentially, at that point in the trial, there was a clear error of misjoinder under Rule 8 standards. Nevertheless, the *Schaffer* Court held that once the Rule 8 requirements were met by the allegations in the indictment, severance thereafter is controlled entirely by Federal Rule of Criminal Procedure 14, which requires a showing of prejudice. *Id.*, at 515–516. The Court then affirmed the finding of no prejudice. Although the Court did not reach the harmless-error rule because Rule 8(b) had initially been satisfied, the Court's language surely assumed the rule was applicable.

A plain reading of these cases shows they dictate our holding. Applying the 1919 statute treated in *Kotteakos*, which governed only "technical errors," 28 U. S. C. § 391 (1946 ed.), the Court emphasized the clear intent of Congress "was simple: To substitute judgment for automatic application of rules." 328 U. S., at 759–760. "In the final analysis judgment in each case must be influenced by conviction resulting from examination of the proceedings in their entirety, tempered but not governed in any rigid sense of *stare decisis* by what has been done in similar situations." *Id.*, at 762. The Court flatly rejected *per se* rules regarding particular errors because "any attempt to create a generalized presumption to apply in all cases would be contrary not only to the spirit of [the statute] but also to the expressed intent of its legislative sponsors." *Id.*, at 765.

Schaffer discussed the current harmless-error statute, which was enacted in 1949 after *Kotteakos* and deleted the qualifying word "technical" regarding errors governed by the rule. See 28 U. S. C. § 2111. The Court again rejected any *per se* rule for joinder errors requiring reversal, refusing to "fashion a hard-and-fast formula that . . . [the] joinder [wa]s error as a matter of law." 362 U. S., at 516. Citing

Kotteakos, the Court pointed out that there "[t]he dissent agreed that the test of injury resulting from joinder 'depends on the special circumstances of each case.'" 362 U. S., at 517 (quoting 328 U. S., at 777 (Douglas, J., dissenting)).[11]

In common with other courts, the Court has long recognized that joint trials "conserve state funds, diminish inconvenience to witnesses and public authorities, and avoid delays in bringing those accused of crime to trial." *Bruton* v. *United States*, 391 U. S. 123, 134 (1968). Rule 8 accommodates these interests while protecting against prejudicial joinder. But we do not read Rule 8 to mean that prejudice results *whenever* its requirements have not been satisfied.

Under Rule 52(a), the harmless-error rule focuses on whether the error "affect[ed] substantial rights." In *Kotteakos* the Court construed a harmless-error statute with similar language, and observed:

> "The inquiry cannot be merely whether there was enough to support the result, apart from the phase affected by the error. It is rather, even so, whether the error itself had substantial influence. If so, or if one is left in grave doubt, the conviction cannot stand." 328 U. S., at 765.

Invoking the *Kotteakos* test, we hold that an error involving misjoinder "affects substantial rights" and requires reversal only if the misjoinder results in actual prejudice because it "had substantial and injurious effect or influence in determining the jury's verdict." *Id.*, at 776. Only by so holding can we bring Rules 8 and 52(a) "into substantial harmony, not into square conflict."[12] *Id.*, at 775.

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[11] Contrary to these clear holdings, the dissent advocates a rule-by-rule review establishing bright-line *per se* rules whether to conduct harmless-error analysis. *Post*, at 9–10. But on its face, Rule 52(a) admits of no broad exceptions to its applicability. Any assumption that once a "substantial right" is implicated it is inherently "affected" by any error begs the question raised by Rule 52(a). Assuming there is a "substantial right," the inquiry remains whether the error "affects substantial rights" requiring reversal of a conviction. That kind of inquiry requires a review of the entire record. See *United States* v. *Hasting*, 461 U. S., at 509. It is simply too late in the day to argue that Congress intended to incorporate any *per se* rule of *McElroy* for misjoinder following *Kotteakos*, the subsequent enactment of an arguably broader statute, and this Court's prejudice inquiry in *Schaffer*.

Of course, "we are not required to review records to evaluate a harmless-error claim, and do so sparingly, [but] we plainly have the authority to do so." *United States* v. *Hasting*, 461 U. S., at 510 (footnote omitted).

In the face of overwhelming evidence of guilt shown here, we are satisfied that the claimed error was harmless. When evidence on misjoined Count 1 was introduced, the District Court provided a proper limiting instruction, and in the final charge repeated that instruction and admonished the jury to consider each count and defendant separately. Moreover, the same evidence on Count 1 would likely have been admissible on joint retrial of Counts 2 through 6 to show James

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[12] Respondents argue that application of the harmless-error rule to Rule 8(b) misjoinder will eviscerate Rule 14, which provides the trial court with discretion to grant a severance even if the joinder is proper under Rule 8 when it believes the defendants or the Government may be prejudiced by a joinder. We see no conflict with our holding and the applicability of Rule 14. Rule 14's concern is to provide the trial court with some flexibility when a joint trial may appear to risk prejudice to a party; review of that decision is for an abuse of discretion. Rule 8(b), however, requires the granting of a motion for severance unless its standards are met, even in the absence of prejudice; review on appeal is for an error of law. Applying the harmless-error rule to Rule 8(b) misjoinder simply goes to the additional question whether the error requires setting aside the convictions. We need not decide whether the degree of prejudice necessary to support a Rule 14 motion for severance is identical to that necessary to require reversal for a Rule 8(b) error.

The dissent fails to recognize that the Rule 14 prejudice component involves a different inquiry from the Rule 8 technical requirements. Indeed, the express language of Rule 14, as well as the Advisory Committee Note, shows that Congress tolerates some Rule 8 joinders even when there is prejudice. The first hurdle in obtaining a severance under Rule 14 is a showing of prejudice, and if shown, it remains in the district court's discretion whether to grant the motion.

Lane's intent under Federal Rule of Evidence 404(b). Any error therefore failed to have any "substantial influence" on the verdict. *Kotteakos*, *supra*, at 765.[13]

III

Respondents challenge the sufficiency of the evidence to

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[13] We can agree with the dissent "that the harmless error inquiry is entirely distinct from a sufficiency-of-the-evidence inquiry." *Post*, at 12; our reliance on the *Kotteakos* test makes that clear. See *supra*, at 10. But that does not in any sense mean that overwhelming evidence of guilt is irrelevant; the threshold of overwhelming evidence is far higher than mere sufficiency to uphold conviction.

Nor may proper limiting instructions or jury charges never be "an adequate response" to a prejudice inquiry. *Post*, at 13. Contrary to the suggestion of the dissent, *Blumenthal* v. *United States*, 332 U. S. 539 (1947), provides direct support for the Court's approach in this case. There the Court recognized that, *in the context of mass trials* (as in *Kotteakos*), limiting instructions on evidence admissible only as to one defendant might in some circumstances be inadequate to prevent prejudice. *Id.*, at 559–560. But here, as in *Blumenthal*, we are not faced with any trial *en masse* of numerous defendants and unrelated crimes.

When there are few defendants and the trial court is aware of the potential for prejudice, "the risk of transference of guilt over the border of admissibility [may be] reduced to the minimum" by carefully crafted limiting instructions with a strict charge to consider the guilt or innocence of each defendant independently. *Id.*, at 560. We cannot necessarily "assume that the jury misunderstood or disobeyed" such instructions. *Id.*, at 553. Indeed, this Court's conclusion in *Schaffer* that defendants failed to show prejudice was based directly on the fact that "the judge was acutely aware of the possibility of prejudice and was strict in his charge—not only as to the testimony the jury was not to consider, but also as to that evidence which was available in the consideration of the guilt of each [defendant] separately under the respective substantive counts." 362 U. S., at 516.

The same caution was exercised by the trial judge here, and no different result should be required. The Government initially observes that because of the similarity of each arson scheme, "only the court of appeals' narrow reading of Rule 8" led to its finding of misjoinder. At trial, Heard and Lankford—two principal actors—testified against both Lanes, who relied essentially on denials or character defenses. Moreover, the evidence as to Count 1 was distinct and easily segregated from evidence relating to sustain their convictions. To find a violation of the mail fraud statute, 18 U. S. C. § 1341,[14] the charged "mailings" must be "for the purpose of executing the scheme." *Kann* v. *United States*, 323 U. S. 88, 94 (1944). Mailings occurring after receipt of the goods obtained by fraud are within the statute if they "were designed to lull the victims into a false sense of security, postpone their ultimate complaint to the authorities, and therefore make the apprehension of the defendants less likely than if no mailings had taken place." *United States* v. *Maze*, 414 U. S., at 403. See *United States* v. *Sampson*, 371 U. S. 75 (1962).

Only Counts 2 through 4, involving the duplex fire, are at issue. The Lanes argue that each mailing occurred after irrevocable receipt of the related payment, and thus after each scheme to defraud came to fruition.[15] This argument misconstrues the nature of the indictment, which charged an overall scheme to defraud based on the events surrounding the duplex fire. Counts 2 through 4 merely relate to sepa-

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Counts 2 through 6. The misjoinder error, if any, in these circumstances was harmless.

[14] The statute provides in relevant part:

"Whoever, having devised or intending to devise any scheme or artifice to defraud, . . . for the purpose of executing such scheme or artifice . . ., places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, . . . or knowingly causes to be delivered by mail . . . any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both."

[15] The Government contends that undisputed testimony shows the insurance drafts issued to the Lanes, unlike normal business checks, were not payable on demand but only upon authorization from the insurer's home office when they arrived at the insurer's bank for collection. If the drafts deposited by the Lanes had been dishonored by the insurer's banks, the amounts would have been charged against their account. The Lanes, therefore, may not have irrevocably received the proceeds of the fraud prior to the final mailing. See Brief for United States 30–31. The Court of Appeals, however, did not rely on this argument, and we decline to resolve this factual issue here.

rate mailings concerning partial payments that were a part of the whole scheme. The jury could properly find the scheme, at the earliest, was not completed until receipt of the last payment on September 16, 1980, which finally settled their claim. Hence, the mailings charged in Counts 2 and 3 clearly took place while the scheme was still continuing.

Moreover, the jury could reasonably have found that the scheme was not completed until the final mailing on September 18, 1980, charged in Count 4, because that mailing was intended (as were the two earlier ones) to "lull" the insurer into a false sense of security.[16] The jury was properly instructed that each charged mailing must have been made both "for the purpose of executing the scheme to defraud," App. 22, and *prior* to the scheme's completion, *id.*, at 23, and further that mailings "which facilitate concealment of the scheme" are covered by the statute.[17] *Id.*, at 24.

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[16] Our conclusion that the delayed mailings at issue in this case were part of an ongoing scheme to defraud is in accord with our holding in *United States* v. *Sampson*, 371 U. S. 75 (1962). In that case, defendants purported to help businessmen obtain loans or sell their businesses in exchange for an "advance fee." *Id.*, at 77. Following the deposit of checks for these fees, the defendants' plan called for the mailing of a form letter assuring the victims of the fraud that they were receiving the services they paid for. *Id.*, at 78. The Court upheld defendants' convictions for mail fraud because of the "lulling effect" of the delayed mailings.

We see no conflict with our holding in *United States* v. *Maze*, 414 U. S. 395 (1974). There, use of a stolen credit card led to the mailing of charge statements to a bank. We held that the fraud was completed upon the defrauder's receipt of the goods, distinguishing *Sampson* because the mailing of the charge slips, rather than acting to "lull" the bank into acquiescence, instead "increased the probability that [the defrauder] would be detected and apprehended." 414 U. S., at 403. Had the Lanes failed to submit timely proof-of-loss forms here, the insurer might very well have discovered the fraud.

The Lanes contend that the Fifth Circuit's decision in this case also conflicts with *United States* v. *Ledesma*, 632 F. 2d 670 (CA7), cert. denied, 449 U. S. 998 (1980), which reversed a conviction involving the mailing of a fraudulent proof-of-loss form after receipt of insurance proceeds. In that case, however, the Seventh Circuit never discussed *Sampson* or the possibility that the delayed mailing had any "lulling" effect.

The judgment of the Court of Appeals, ordering a new trial based on misjoinder of Count 1 with Counts 2 through 6, is reversed in part and affirmed in part, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

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[17] The Lanes argue that the Government must show that the charged mailings were specifically intended to lull, rather than showing simply a general intention on their part to defraud, in order to come within *Sampson*'s holding. We need not determine whether any such specific intent must be shown, as we agree with the Court of Appeals that there was sufficient evidence for the jury to infer specific intent to lull here under these instructions, which the Lanes did not challenge on appeal or in their cross-petition.

SUPREME COURT OF THE UNITED STATES

Nos. 84-744 AND 84-963

UNITED STATES, PETITIONER
84-744 *v.*
JAMES C. LANE AND DENNIS R. LANE

JAMES C. LANE AND DENNIS R. LANE, PETITIONER
84-963 *v.*
UNITED STATES

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

[January 27, 1986]

JUSTICE BRENNAN, joined by JUSTICE BLACKMUN, concurring in part and dissenting in part.

I agree that the evidence was sufficient to sustain the mail fraud convictions and therefore join Part III of the Court's opinion. I also agree that the Court of Appeals erred in holding that misjoinder under Rule 8 of the Federal Rules of Criminal Procedure is prejudicial *per se*. I write separately, however, because my reasons for reaching this conclusion differ from the Court's, and because I agree with JUSTICE STEVENS that the harmless-error inquiry should be made in the first instance by the Court of Appeals.

I

The Act of February 26, 1919 (1919 Act), 40 Stat. 1181, amended § 269 of the Judicial Code. It provided in part:

> "On the hearing of any appeal, certiorari, writ of error, or motion for a new trial, in any case, civil or criminal, the court shall give judgment after an examination of the entire record before the court, without regard to

> technical errors, defects, or exceptions which do not affect the substantial rights of the parties." 28 U. S. C. §391 (1925–1926 ed.).

In 1949, this provision was reenacted in its current form as 28 U. S. C. §2111, and now instructs appellate courts to "give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties." The 1919 Act was also incorporated in the Federal Rules of Criminal Procedure, and Rule 52(a) provides that "[a]ny error, defect, irregularity or variance which does not affect substantial rights shall be disregarded." See also, Fed. Rule Civ. Proc. 61 ("The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties"). Although §2111 and Rule 52(a) refer to "errors or defects" without the qualifying word "technical," this change did not alter the substantive legal test. See H. R. Rep. No. 352, 81st Cong., 1st Sess., 18 (1949) (§2111 "[i]ncorporates" former harmless-error statute); Advisory Committee's Notes on Fed. Rule, 18 U. S. C. App., p. 657 (Rule is a "restatement of existing law").

The 1919 Act, §2111 and Rule 52(a) all provide that an error is to be disregarded unless it "affects the substantial rights of the parties." This litigation thus presents a straightforward question of statutory construction: what does the phrase "affects the substantial rights of the parties" mean? Respondents in No. 84–744 contend that the term "substantial rights" refers to a particular class of rights which are essential to a fair trial and argue that errors which "affect" these rights cannot be disregarded on appeal. According to respondents, the 1919 Act, as reenacted in §2111 and Rule 52(a), incorporated our holding in *McElroy* v. *United States*, 164 U. S. 76 (1896), that joinder is one of these "substantial rights," so that misjoinder is *per se* reversible.

For the reasons which follow, I conclude that the question whether a particular error "affects the substantial rights of the parties" does not entail a process of classification, whereby some rights are deemed "substantial" and errors affecting these rights are automatically reversible. Rather, an error "affects substantial rights" only if it casts doubt on the outcome of the proceeding. In other words, subject to the exceptions discussed in Part II (most importantly the exception for constitutional errors), I read § 2111 and Rule 52(a) to require harmless-error inquiry for all procedural errors. As none of these exceptions is applicable to misjoinder in violation of Rule 8, I concur in the Court's result on this issue.

Reference to whether error "affected the substantial rights of the parties" was not invented by Congress in 1919. The phrase was commonly used by courts throughout the 19th century to express the conclusion that particular claims of error did or did not warrant reversal. However, as used by these courts, error which "affected the substantial rights of the parties" was generally understood to refer, not to errors respecting a particular class of rights, but rather to any error which affected the fairness of the trial as a whole by calling into question the reliability of the result. See, *e. g., Connors* v. *United States*, 158 U. S. 408, 411, 414 (1895); *Maish* v. *Arizona*, 164 U. S. 599, 602 (1896); *Williams* v. *United States*, 168 U. S. 382, 390–398 (1897); *American Surety Co.* v. *Pauly*, 170 U. S. 133, 159 (1898); *McCabe & Steen Constr. Co.* v. *Wilson*, 209 U. S. 275, 279 (1908); *Holmgren* v. *United States*, 217 U. S. 509, 523–524 (1910). In other words, the statement that an error did not "affect the substantial rights of the parties" was a way of stating the conclusion that the error was not prejudicial.

A careful reading of *McElroy* demonstrates that it is consistent with this understanding of the phrase "affects the substantial rights of the parties." In *McElroy*, five defendants were charged in two indictments with separate assaults and in a third indictment with arson. Three of the defendants were also charged in yet a fourth indictment with another assault. After explaining these charges, the Court noted that "it is the settled rule . . . to confine the indictment to one distinct offence or restrict the evidence to one transaction" because "[i]n cases of felony, the multiplication of distinct charges has been considered so objectionable as tending to confound the accused in his defence, or to prejudice him as to his challenges . . . ." 164 U. S., at 80. The Court then stated: "Necessarily where the accused is deprived of a substantial right by the action of the trial court, such action, having been properly objected to, is revisable on error." *Ibid.* In context, this merely restates the common-law understanding that an error is reversible if it prejudices the defendant. The Court did not state that joinder is a "substantial right" and, for this reason, any error respecting joinder is reversible. Rather, the Court held that "[i]t cannot be said in [a case of improper joinder] that all the defendants may not have been embarrassed and prejudiced in their defence, or that the attention of the jury may not have been distracted to their injury in passing upon distinct and independent transactions." *Id.*, at 81. In other words, the Court concluded that misjoinder is the kind of error which must be presumed to have prejudiced the accused and, for *that* reason, misjoinder affects his "substantial rights." As discussed in Part II, the irrebuttable presumption that misjoinder is prejudicial is inconsistent with the Court's subsequent harmless-error jurisprudence and can be overruled. For the moment, however, it is important only to note that nothing in *McElroy* suggests that the requirement that error have "affect[ed] the substantial rights of the parties" refers to anything other than that the error have been prejudicial.

Absent some contrary indication, then, it would seem logical to conclude that when Congress used the phrase "affect[s] the substantial rights of the parties" in the 1919 Act, Congress meant to require an inquiry into whether an error cast doubt on the verdict, not to create a class of rights as to which error was *per se* reversible. The legislative history of the 1919 Act confirms that this was in fact what Congress intended.

The primary impetus for the enactment of the 1919 Act was the practice in some jurisdictions of reversing convictions on appeal for any procedural error at trial, without regard to whether the error was prejudicial. See *Kotteakos* v. *United States*, 328 U. S. 750, 758–759 (1946). There was also concern over the inconsistent application of harmless-error analysis by other courts, this Court in particular. See H. R. Rep. No. 913, 65th Cong., 3d Sess., 2 (1919) (quoting H. R. Rep. No. 611, 62d Cong., 2d Sess., 2 (1912)). The large number of reversals which resulted from failure to scrutinize errors for their prejudicial effect was criticized by leaders of the legal profession, including Taft, Pound, Wigmore, and Hadley. See *Kotteakos*, *supra*, at 758–759. After prolonged consideration, Congress responded to this criticism by passing the 1919 Act. The House Report accompanying the Act explained:

> "'It is the purpose of the . . . bill to enact, in so far as the appellate courts are concerned, that in the consideration in an appellate court of a writ of error or an appeal judgment shall be rendered upon the merits without permitting reversals for technical defects in the procedure below and *without presuming that any error which may appear had been of necessity prejudicial to the complaining party.*'" H. R. Rep. No. 913, *supra*, at 2 (quoting H. R. Rep. No. 611, *supra*, at 2) (emphasis added).

The theme that reversal be limited to prejudicial errors is found throughout the legislative history. For example, the Report accompanying the first version of the bill to pass the House of Representatives explained the meaning of the requirement that error be disregarded unless it "affect[s] the substantial rights of the parties" by quoting from an article by President Taft: "'No judgment of the court below should be reversed except for an error which the court, after hearing the entire evidence, can affirmatively say would have led to a different verdict.'" H. R. Rep. No. 1949, 61st Cong., 3d Sess., 1 (1911) (quoting Taft, The Administration of Criminal Law, 15 Yale L. J. 1, 16 (1905)). The Report criticized the practice of reversing judgments for errors which "did not in the least affect the substantial rights of the parties, *the real merits of the case having been properly adjudicated upon the first trial.*" H. R. Rep. No. 1949, *supra*, at 2 (emphasis added). See also, *ibid.* (quoting Justice Gorman of the New York Supreme Court to the effect that "[o]ne of the gravest faults with our present mode of trial is the ease and frequency with which judgments are reversed on technicalities which do not affect the merits of the case, and which at no stage of the case have affected the merits"); H. R. Rep. No. 1218, 63d Cong., 3d Sess. (1914); H. R. Rep. No. 264, 64th Cong., 1st Sess. (1916).

Our decision in *Kotteakos* v. *United States*, *supra*, forecloses any remaining questions as to the interpretation of the phrase "affects substantial rights of the parties." In *Kotteakos*, we expressly rejected the argument that the the 1919 Act required a determination of "what are only technical, what substantial rights; and what really affects the latter hurtfully." 328 U. S., at 761. We held instead that the Act's command to disregard errors unless they "affect the substantial rights of the parties" was a command not to overturn a conviction unless, after examining the record as a whole, the court concludes that an error may have had "substantial influence" on the outcome of the proceeding. *Id.*, at 765. Justice Rutledge's explanation, which includes a description of the proper analysis to apply in evaluating the effect of procedural errors, is well worth repeating:

> "It comes down on its face to a very plain admonition: 'Do not be technical, where technicality does not really hurt the party whose rights in the trial and in its outcome the technicality affects.' . . .

"Easier was the command to make than it has been always to observe. This, in part because it is general; but in part also because the discrimination it requires is one of judgment transcending confinement by formula or precise rule. That faculty cannot ever be wholly imprisoned in words, much less upon such a criterion as what are only technical, what substantial rights; and what really affects the latter hurtfully. Judgment, the play of impression and conviction along with intelligence, varies with judges and also with circumstance. What may be technical for one is substantial for another; what minor and unimportant in one setting crucial in another.

. . . . .

"In the final analysis judgment in each case must be influenced by conviction resulting from examination of the proceedings in their entirety, tempered but not governed in any rigid sense of *stare decisis* by what has been done in similar situations. Necessarily the character of the proceeding, what is at stake upon its outcome, and the relation of the error asserted to casting the balance for decision on the case as a whole, are material factors in judgment.

. . . . .

"If, when all is said and done, the conviction is sure that the error did not influence the jury, or had but very slight effect, the verdict and the judgment should stand, except perhaps where the departure is from a constitutional norm or a specific command of Congress. But if one cannot say, with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not substantially swayed by the error, it is impossible to conclude that substantial rights were not affected. The inquiry cannot be merely whether there was enough to support the result, apart from the phase affected by the error. It is rather, even so, whether the error itself had substantial

> influence. If so, or if one is left in grave doubt, the conviction cannot stand." *Id.*, at 760–765 (citations and footnotes omitted).[1]

II

This interpretation of § 2111 and Rule 52(a) as requiring examination of the prejudicial effect of all procedural errors is subject to several exceptions. First, and most importantly, constitutional errors are governed by the Due Process Clauses of the Fifth and Fourteenth Amendments rather than by § 2111 and Rule 52(a). See *Chapman* v. *California*, 386 U. S. 18 (1967); *United States* v. *Hasting*, 461 U. S. 499 (1983). Thus, the test for harmless constitutional error is stricter than its statutory counterpart. Compare, *Chapman*, *supra*, at 24 (prosecution must establish that the error was "harmless beyond a reasonable doubt"), with *Kotteakos*, *supra*, at 765 (error is harmless unless it had "substantial influence" on the outcome or leaves one in "grave doubt" as to whether it had such effect).[2] In addition, Congress may, of course, expressly provide that a particular right is excluded from the operation of the harmless-error rule. Neither of these exceptions applies to misjoinder in violation of Rule 8, however. Misjoinder does not ordinarily rise to the level of a constitutional violation,[3] and nothing in the language or history of either the statutory harmless-error provisions or Rule 8 indicates that Congress chose to except misjoinder from harmless-error scrutiny.[4]

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[1] It scarcely needs repeating that, since correction may come from the legislature, considerations of *stare decisis* are at their strongest when this Court confronts its previous constructions of a statute. Cf. *Burnet* v. *Coronado Oil & Gas Co.*, 285 U. S. 393, 406–407 (1932) (Brandeis, J., dissenting).

[2] Until *Chapman* v. *California*, 368 U. S. 18 (1967), harmless-error analysis was considered inapplicable to errors respecting constitutional rights. See *id.*, at 42–44 (Stewart, J., concurring in result) ("in a long line of cases, involving a variety of constitutional claims in both state and federal prosecutions, this Court has steadfastly rejected any notion that constitutional violations might be disregarded on the ground that they were 'harmless'" (citing and discussing examples)); see also, *Kotteakos*, 328 U. S., at 764–765, and n. 19. In *Chapman*, we altered this practice and held that "there may be some constitutional errors which in the setting of a particular case are so unimportant and insignificant that they may, consistent with the Federal Constitution, be deemed harmless, not requiring the automatic reversal of the conviction." 386 U. S., at 22. Although we have since held that the *Chapman* harmless-error test applies to "most constitutional violations," *United States* v. *Hasting*, 461 U. S., at 509, harmless-error analysis remains inapplicable to many constitutional rights.

JUSTICE STEVENS' dissent recognizes two further exceptions: (1) "when an independent value besides reliability of the outcome suggests that [harmless-error] analysis is inappropriate," and (2) "when the harmlessness of the error cannot be measured with precision." *Post*, at 10. Although the cases he cites to support these additional exceptions involved constitutional errors, JUSTICE STEVENS may well be correct in asserting that they also apply to errors governed by the statutory harmless-error provisions. I need not decide that

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E. g., *Vasquez* v. *Hillery*, 474 U. S. —— (1985) (discrimination in grand jury selection); *Connecticut* v. *Johnson*, 460 U. S. 73, 84–88 (1983) (opinion of BLACKMUN, J.) (*Sandstrom* violation); *Gideon* v. *Wainwright*, 372 U. S. 335 (1963) (right to counsel); *Tumey* v. *Ohio*, 273 U. S. 510 (1927) (right to impartial tribunal).

Because the source and nature of the harmless-error test for constitutional errors does not derive from § 2111 or Rule 52(a), our cases concerning constitutional errors do not affect, and are not affected by, our decision today, which applies only to the statutory harmless-error doctrine.

[3] But cf. *Bruton* v. *United States*, 391 U. S. 123 (1968). It is also possible that a particular case of misjoinder may be so egregious as to constitute a deprivation of due process. If this were the case, the error would be governed by *Chapman* rather than by § 2111 or Rule 52(a). See *infra*, n. 4. Of course, a joinder of claims or parties that was so improper as to violate the Due Process Clause would undoubtedly also be prejudicial.

[4] As explained above, the 1919 Act was not intended to codify a rule of *per se* reversal for particular rights, much less for misjoinder. Similarly, as the majority points out, nothing in the legislative history of Rule 8 indicates an intent to do anything more then set forth the technical requirements for and limitations on the joinder of claims or defendants. *Ante*, at 6, n. 7.

question to conclude, as does JUSTICE STEVENS, that—like the first two exceptions—neither applies to misjoinder.

The applicability of the exception to protect values other than reliability is easily disposed of. Rules respecting joinder are based on recognition that the multiplication of charges or defendants may confuse the jury and lead to inferences of habitual criminality or guilt by association. *McElroy*, 164 U. S., at 80. Apart from this, however, joinder rules do not serve "an independent value besides reliability of the outcome" justifying an exception to the harmless-error principle. Surely it cannot be maintained that misjoinder affects a right so fundamental to a fair trial that it "'infect[s] the validity of the underlying judgment itself, or the integrity of the process by which that judgment was obtained.'" *Post*, at 10, n. 15 (quoting *Rose* v. *Lundy*, 455 U. S. 509, 544 (1982) (STEVENS, J., dissenting)).

The exception for errors as to which the prejudicial effect cannot be measured with precision requires closer consideration. As previously noted, *McElroy* held that misjoinder is *per se* reversible because a court can never safely conclude that it was not prejudicial. 164 U. S., at 81. However, trial courts routinely inquire into possible prejudice from joint trials when considering motions for severance under Federal Rule of Criminal Procedure 14, and appellate courts just as routinely perform that inquiry in reviewing Rule 14 rulings.[5] To be sure, problems of jury confusion arising from misjoinder may be substantial. It is also quite easy for the jury to be prejudiced by evidence of other crimes or by inferences from an accused's association with other defendants. Thus, it may be that, once the proper test for harmless error is applied, most misjoinders will in fact result in reversal. However, the prejudice that may result from misjoinder is not so difficult to ascertain that it must always be presumed to be present. Whatever force the holding in *McElroy* may once have had, its precedential force has been greatly eroded by the 1919 Act, whose legislative history disapproves of such presumptions, *supra*, at ——, and by subsequent decisions such as *Kotteakos*.[6] Today, adherence to the view that misjoinder is *per se* prejudicial would stand out as a stark and unjustified anomaly, leading to just the sort of unnecessary reversals that inspired enactment of the 1919 Act. To the extent that *McElroy* states a contrary holding, I would overrule it.

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[5] The Court correctly notes in its opinion, see *ante*, at 11, and n. 12, that while the nature of the inquiry under Rules 8 and 14 is similar, the purposes and scope of these Rules are different.

III

The Court goes on to resolve the harmless-error question. I respectfully dissent. To begin with, I agree with JUSTICE STEVENS that "[u]ndertaking a harmless-error analysis is perhaps the least useful function that this Court can perform." *Post*, at 12. See *United States* v. *Hasting*, 461 U. S., at 520, n. 2 (opinion of BRENNAN, J.); see also, *Connecticut* v. *Johnson*, 460 U. S. 73, 102 (1983) (POWELL, J., dissenting). Having concluded that a harmless-error inquiry is required, I, like JUSTICE STEVENS, think we should remand to the Court of Appeals, which is in a better position than we are to study the complete trial record with care.

Moreover, it is apparent that the Court's perfunctory effort to evaluate the effect of this error is inadequate. The Court tells us simply that the error is harmless "[i]n the face of overwhelming evidence shown here . . . ." *Ante*, at 11. But where is the "examination of the proceedings in their entirety" called for by *Kotteakos*? See 328 U. S., at 762.

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[6] *Kotteakos* rejected the argument that variance between the indictment and proof at trial should be *per se* reversible because such errors "naturally" result in prejudice. Relying on the legislative history of the harmless-error rule, the Court concluded that such presumptions should not lightly be inferred. "The only permissible presumption," the Court said, "would seem to be particular, arising from the nature of the error and 'its natural effect' for or against prejudice in the particular setting." 328 U. S., at 765–766.

Kotteakos instructs the reviewing court to "ponde[r] all that happened without stripping the erroneous action from the whole," and expressly states that "[t]he inquiry cannot be merely whether there was enough to support the result, apart from the phase affected by the error." *Id.*, at 765. Obviously, the existence of overwhelming evidence is relevant to determining the "effect the error had or reasonably may be taken to have had upon the jury's decision." *Id.*, at 764. But I would have thought it equally obvious that, at the very least, consideration of the magnitude of the error in the context of the trial would also be called for; this the Court has not done. The Court also tells us that the error was harmless because the same evidence "would likely have been admissible" at a joint retrial of the defendants without the improper count. *Ante*, at 11–12. However, as I thought *Kotteakos* made clear, that is irrelevant. The crucial thing is the effect the error had in the proceedings which actually took place, not whether the same thing could have been done in hypothetical proceedings. See 328 U. S., at 762–765. Harmless-error analysis is not an excuse for overlooking error because the reviewing court is itself convinced of the defendant's guilt. The determination of guilt is for the jury to make, and the reviewing court is concerned solely with whether the error may have had a "substantial effect" upon that body.

Justice Traynor of the California Supreme Court wrote that "the evaluation of an error as harmless or prejudicial is one of the most significant tasks of an appellate court, as well as one of the most complex." R. Traynor, The Riddle of Harmless Error 80 (1970). It is a task this Court is manifestly ill-equipped to undertake. See *United States* v. *Hasting*, *supra*, at 516–518 (Stevens, J., concurring in judgment). I would remand the case for the Court of Appeals to undertake the task.

SUPREME COURT OF THE UNITED STATES

Nos. 84–744 AND 84–963

UNITED STATES, PETITIONER
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JAMES C. LANE AND DENNIS R. LANE, PETITIONER
84–963 *v.*
UNITED STATES

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

[January 27, 1986]

JUSTICE STEVENS, with whom JUSTICE MARSHALL joins, dissenting in No. 84–744 and concurring in No. 84–963.

Rule 52(a) of the Federal Rules of Criminal Procedure provides:

> "Harmless Error. Any error, defect, irregularity or variance which *does not affect substantial rights* shall be disregarded." (Emphasis added.)

The question presented in No. 84–744 is whether a misjoinder of defendants prohibited by Rule 8(b) is an error which affects substantial rights.[1] In my opinion, the Court has answered that question incorrectly; moreover, its opinion unfortunately confuses rather than clarifies the law of "harmless error."

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[1] Rule 8(b) provides: "Two or more defendants may be charged in the same indictment or information if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses. Such defendants may be charged in one or more counts together or separately and all of the defendants need not be charged in each count."

I

Our central task is, of course, to construe Rule 8(b) of the Federal Rules of Criminal Procedure. Thus, we must consider the history, purpose, and language of that Rule.

Prior to the adoption of the Federal Rules of Criminal Procedure, this Court decided that the misjoinder of defendants, as well as the misjoinder of offenses, was an error that deprived the accused of "a substantial right." *McElroy* v. *United States*, 164 U. S. 76, 80 (1896). *McElroy* concerned both kinds of misjoinder. Five defendants were charged with offenses committed on April 16, 1894 and May 1, 1894, but only three of them were charged with a separate offense committed on April 16, 1894. The two defendants who were not charged with the separate offense made essentially the same objection to their joint trial as did Dennis Lane in this case. As to those two defendants, the Government confessed error and the Court unanimously reversed and remanded for a new trial.[2] As to the other three defendants, the majority of the Court held that a misjoinder of offenses had occurred, and required a new trial without any special showing of prejudice. After reviewing the misjoinder of defendants and of offenses, the Court concluded:

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[2] "It is clear that the statute does not authorize the consolidation of indictments in such a way that some of the defendants may be tried at the same time with other defendants charged with a crime different from that for which all are tried.

. . . . .

"It is admitted by the government that the judgments against Stufflebeam and Charles Hook must be reversed . . ." 164 U. S., at 80.

In confessing error, the Government seemed to concede that reversal was appropriate without any specific showing of prejudice. See Brief for United States in *McElroy* v. *United States*, O. T. 1896, No. 402, p. 6 ("It cannot be certainly affirmed that Stufflebeam and Charles Hook were not embarrassed and prejudiced, in their defense to the indictments under which they stood charged, by the fact that they were compelled to make their defense in a proceeding in which McElroy, Bland, and Hook were prosecuted for arson committed April 16, 1894, which was on the same day of the assaults and fifteen days before the arson for which they were tried").

> "Necessarily where the accused is deprived of a substantial right by the action of the trial court, such action, having been properly objected to, is revisable on error." 164 U. S., at 80.

Thus, almost a half century before the adoption of Rule 8, the Court squarely held that protection against misjoinder was a "substantial right," and that the violation of the misjoinder rule required reversal.

Today, the Court does not dispute that *McElroy* required reversal for misjoinder. Instead, the Court suggests, rather obliquely, that three developments have undermined that holding: (1) the adoption of Rule 8; (2) the adoption of Rule 52(a) and the passage of the harmless-error statute; and (3) the development of a harmless-error doctrine in constitutional law. *Ante*, at 6–8. The reliance on the harmless-error developments will be addressed in more detail. Since we are construing Rule 8, however, the majority's bare citation to it—and apparent reliance on the history of its passage—must be first considered.

The majority seems to be of the view that the adoption of Rule 8 cast doubt on the validity of *McElroy*. *Ante*, at 6. Far from disavowing *McElroy*, however, the Federal Rules continued the misjoinder rule. The notes of the Advisory Committee on Rules state that both sections of Rule 8 represent "substantially a restatement of existing law." Neither the text of Rule 8, nor the Advisory Committee Notes, nor the history of the Rule contains *any* suggestion that Rule 8 was intended to change the rule of the *McElroy* case. Indeed, the Advisory Committee displayed a keen awareness of the *McElroy* precedent by citing the opinion in its discussion of misjoinder.[3] At the time the Federal Rules were being considered, moreover, commentators shared the Advisory Committee's view that the Rules merely continued the misjoinder doctrine in its then current form, and restated existing law.[4] The principle that misjoinder deprives the accused of "a substantial right" and therefore is "revisable on error" thus remained the law when the Federal Rules of Criminal Procedure became effective in 1946.

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[3] See 5 Federal Rules of Criminal Procedure: Documentary History, Second Preliminary Draft, Feb. 1944, Note to Rule 8, pp. 35–36 ("Since the

Furthermore, if one reads Rule 8 in conjunction with Rule 14, it is immediately apparent that the draftsmen of the Rules regarded every violation of Rule 8 as inherently prejudicial. For Rule 14 authorizes the Court to grant a severance, even in the absence of a Rule 8 violation, if either the defendant or the Government is prejudiced by a joinder of offenses or defendants.[5] Thus, it seems clear that the draftsmen of the Rules regarded violations of Rule 8 as inherently prejudicial, and recognized that even joinders that were not prohibited by the rule should be forbidden if a party could demonstrate actual prejudice. This is the way Professor

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counts of two or more indictments consolidated for trial, under 18 U. S. C. § 557, are 'put . . . in the same category as if they were separate counts in one indictment,' *McElroy* v. *United States*, 164 U. S. 76, 77 (1896), this type of joinder is more widely practiced than is generally realized").

[4] See Maguire, Proposed New Federal Rules of Criminal Procedure, 23 Ore. L. Rev. 56, 59 (1943) ("Subdivision (b) of Rule 9 provides for a joinder of defendants where they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting or resulting in an offense, and that they may be charged in one or more counts, together or separately, in any manner indicating their respective particpation in the offense or offenses. . . . This rule merely restates the present Federal statute . . ."). "Rule 9" became the current "Rule 8" without substantial change. See Orfield, Joinder in Federal Criminal Procedure, 26 F. R. D. 23, 28–29 (1960).

[5] Rule 14 provides, in pertinent part: "If it appears that a defendant or the government is prejudiced by a joinder of offenses or of defendants in an indictment or information or by such joinder for trial together, the court may order an election or separate trials of counts, grant a severance of defendants or provide whatever other relief justice requires."

Charles Wright interpreted the intent of the draftsmen in his 1969 treatise. He wrote:

> "Indeed there would be no point in having Rule 8 if the harmless error concept were held applicable to it. If that concept could be applied, then defendant could obtain reversal only if the joinder were prejudicial to him. But Rule 14 provides for relief from prejudicial joinder, and a defendant can obtain a reversal, in theory at least, if he has been prejudiced even though the joinder was proper. If misjoinder can be regarded as harmless error, then reversal could be had only for prejudice whether the initial joinder was proper or improper. If that were true, it would be pointless to define in Rule 8 the limits on joinder, since it would no longer be of significance whether those limits were complied with, and the draftsmen would have been better advised to allow unlimited joinder of offenses and defendants, subject to the power of the court to give relief if the joinder were prejudicial." 1 C. Wright, Federal Practice and Procedure, § 144, p. 329 (1969).[6]

Other commentators have agreed that the structure of the Federal Rules strongly supports the conclusion that the draftsmen viewed a violation of the misjoinder rule as inherently prejudicial.[7]

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[6] In his current edition, Professor Wright notes that a number of federal courts have held that misjoinder may be harmless error, but he concludes that "there remains much to be said for what was once the almost-unanimous view that misjoinder is never harmless error." 1 C. Wright, Federal Practice and Procedure: Criminal, § 145, p. 532 (2d ed. 1982).

[7] See Note, Harmless Error and Misjoinder Under the Federal Rules of Criminal Procedure: A Narrowing Division of Opinion, 6 Hofstra L. Rev. 533, 544, n. 65 (1978) ("Implicit in the assertion that rule 8 sets the limits of tolerable prejudice is the argument that if its purpose is not to set such limits there is no purpose in the rule. Rule 14 would vest all questions of joinder in the trial court. . . . As both rule 14 and rule 8 were included in the rules, rule 8 must have been intended to establish the outer bounds within which the trial court has discretionary power under rule 14"). In

Thus, a review of the state of the law of joinder at the time the Federal Rules of Criminal Procedure were adopted, of the Advisory Committee's intent to restate then-existing law, and of the text of the Rules themselves requires a conclusion that a Rule 8 misjoinder violation is an error that affects the substantial rights of the accused and therefore requires reversal of a conviction.

II

In addition to its unexplained reference to the adoption of Rule 8, the Court suggests that its new misjoinder rule—that prejudice must be shown to justify reversal of a Rule 8 misjoinder error—is supported by its interpretation of developments in the law of "harmless error." Specifically, the Court observes that the *McElroy* approach has been undermined by the passage of a harmless-error statute and rule, *ante*, at 6, and by the development of a harmless error doctrine for constitutional errors, *ante*, at 6–7. Although the majority does not distinguish between these two categories, they require separate analysis. Neither category, however, remotely supports the majority's bald assertion that misjoinder should not be viewed as affecting "substantial rights," and thus not be viewed as inherently prejudicial.

The majority refers to the current harmless-error statute, 28 U. S. C. § 2111, and to Rule 52(a). As the majority points out, both define harmless error in terms of whether a violation affects "substantial rights."[8] Since this Court had already made clear that misjoinder affected "substantial rights," *McElroy*, 164 U. S. 76 (1896), it is curious that the

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my view, the majority's discussion of this issue, *ante*, at 11, n. 12, fails to answer this straightforward reading of Rule 8 and Rule 14.

[8] See 28 U. S. C. § 2111 ("On the hearing of any appeal or writ of certiorari in any case, the court shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties"); Fed. Rule Crim. Proc. 52(a) ("Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded").

majority concludes, with no support at all, that the passage of a statute and rule which allowed for correction of errors that did not affect "substantial rights" somehow changed the legal status of a violation that had been described in precisely those words. This view is especially curious when it is remembered that the Rule governing joinder was viewed by the draftsmen as a restatement of existing law.

To be sure, *McElroy* was decided before the first harmless-error statute was passed in 1919. That statute, a reaction to the hypertechnicality that had developed in American jurisprudence, did mark a significant change in our system's view of the effect of error.[9] But it is a long leap from that recognition to a view that the passage of the harmless-error statute in 1919—and the subsequent adoption of Rule 52(a) in 1946 and the passage of the current harmless-error statute in 1949—summarily jettisoned all prior jurisprudence on the errors that affected "substantial rights." Indeed, interpretations of the 1919 statute accorded it a very different mission. As Justice Frankfurter explained in refusing to require a showing of prejudice to justify reversal for a statutory violation, "Suffice it to indicate, what every student of the history behind the Act of February 26, 1919, knows, that that Act was intended to prevent matters concerned with the mere etiquette of trials and with the formalities and minutiae of procedure from touching the merits of a verdict." *Bruno* v. *United States*, 308 U. S. 287, 294 (1939). And, while Rule 52(a) and the 1949 harmless-error statute were changed in a way that some commentators have found significant,[10] the continuation of "substantial rights" as the benchmark for assessing the harmlessness of error provides no support for the proposition that anyone intended to change something that had been found to affect a "substantial right" into something that did not affect a substantial right.

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[9] For a discussion of the background of the 1919 statute, see *Kotteakos* v. *United States*, 328 U. S. 750, 758–760 (1946).

[10] The 1919 statute referred to "*technical* errors, defects, or exceptions which do not affect the substantial rights of the parties." 40 Stat. 1181, 28 U. S. C. § 391 (1946 ed.) (emphasis added). Rule 52(a) referred to "[a]ny error, defect, irregularity or variance which does not affect substantial rights"; the 1949 statute referred to "errors or defects which do not affect the substantial rights of the parties." 28 U. S. C. § 2111. See Note, 6 Hofstra L. Rev., *supra* n. 7, at 540 (discussing possible significance of

Thus, neither the harmless-error statute, passed within a few years of the adoption of Rule 8, nor Rule 52(a), adopted at the same time as Rule 8, changed the interpretation of the misjoinder rule reflected in Rule 8.

The harmless-error statute and rule are, however, at least relevant to the inquiry at hand. In contrast, the majority's reliance on *Chapman* v. *California*, 386 U. S. 18 (1967), *ante*, at 6–7, is plainly misplaced. The majority observes, "Clearly, *Chapman* and *Hasting* dictate that the harmless-error rule governs here." *Ante*, at 7. Nothing could be less clear. This case does not involve a claim of constitutional error. The harmless-error doctrine that was enunciated in *Chapman* v. *California*, 386 U. S. 18 (1967) thus does not settle the issue raised by this case. Simply because constitutional errors may be subject to a harmless-error inquiry does not mean that all nonconstitutional errors must be subject to harmless-error analysis, and this Court has never so held.[11]

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change). But cf. H. R. Rep. No. 352, 81st Cong., 1st Sess., 18 (1949) (new harmless-error statute intended to "incorporate" former harmless-error statute); Rule 52(a), Notes of Advisory Commitee on Rules, 18 U. S. C. App., p. 657 (Rule intended as "a restatement of existing law"); *Kotteakos*, 328 U. S., at 757, n. 9 (citing Advisory Committee comment that Rule 52(a) was intended as "'a restatement of existing law'").

[11] That the Court has recognized the difference between constitutional and nonconstitutional harmless-error inquiries is reflected in the considerable difference in the Court's standards on these two subjects. Compare *Chapman*, 386 U. S., at 24 ("before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt") with *Kotteakos* v. *United States*, 328 U. S., at 765 (in nonconstitutional cases, "[t]he inquiry . . . is . . . whether the error itself had substantial influence"). To the extent that the majority ultimately cites the *Kotteakos* standard as governing this case, *ante*, at 10–11, it is consistent with this distinction in our case law; to the extent

Rather, our mission in reviewing nonconstitutional errors is, first, to discern whether the rule or statute which is being violated was intended to be subject to harmless-error analysis. If there is a definitive answer to that question, our inquiry should be at an end.[12] If there is no definitive answer, then we must try to assess the rule or statute in question in light of the purpose of the harmless-error rule and statute. We should not, however, rewrite existing law by adopting a presumption that, simply because a violation is nonconstitutional, it is automatically subject to harmless-error inquiry.

As the majority observes, the Court's willingness to invoke the harmless-error doctrine has expanded dramatically in recent years. This expansion is a source of considerable concern,[13] particularly because the Court has often been unclear and imprecise in its increasingly frequent invocation of harm-

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that the majority suggests that *Chapman* controls the outcome of this case, however, *ante*, at 7, it reveals confusion about this distinction.

[12] Cf. *Chevron* v. *Natural Resources Defense Council, Inc.*, 467 U. S. 837, 842–843 (1984) ("If the intent of Congress is clear, that is the end of the matter; for the court . . . must give effect to the unambiguously expressed intent of Congress").

[13] See Comment, Harmless Error: Abettor of Courtroom Misconduct, 74 J. Crim. L. & C. 457, 475 (1983) ("The harmless error standards as currently applied in review of criminal trials are eroding the integrity of the criminal justice system by encouraging violations of longstanding trial rules"); Goldberg, Harmless Error: Constitutional Sneak Thief, 71 J. Crim. L. & C. 421, 422 (1980) ("the doctrine of harmless constitutional error destroys important constitutional and institutional values"); Note, Harmful Use of Harmless Error in Criminal Cases, 64 Cornell L. Rev. 538, 540 (1979) ("increased use of harmless error analysis is inherently dangerous regardless of whether the errors violate the Constitution, statutes, or the common law") (footnotes omitted); Cameron & Osborn, When Harmless Error Isn't Harmless, 1971 Law & Social Order 23, 42 ("while the harmless error doctrine is an extremely useful device . . . it is not one that is without its dangers"). Cf. *United States* v. *Jackson*, 429 F. 2d 1368, 1373 (CA7 1970) (Clark, J., sitting by designation) ("'Harmless error' is swarming around the 7th Circuit like bees. . . . [T]he courts may have to act to correct a presently alarming situation").

less error.[14] In my view, harmless-error analysis is inappropriate in at least three situations: (1) when it is clear that a statute or Rule was not intended to be subject to such a rule; (2) when an independent value besides reliability of the outcome suggests that such analysis is inappropriate;[15] and (3) when the harmlessness of an error cannot be measured with precision.[16] In my view, misjoinder clearly falls into the first category. It also has elements of the second and third. Misjoinder implicates the independent value of individual responsibility and our deep abhorrence of the notion of "guilt by association." Our criminal justice system has expanded considerably in its tolerance of multiple joinders and massive conspiracy trials. The rule against misjoinder remains, however, as an ultimate safeguard of our cherished principle that one is tried for one's own deeds, and not for another's.[17] The harmfulness of misjoinder is also the type of error that has consequences that are difficult to measure with precision.[18] These concerns may or may not outweigh the societal interests that motivate the Court today, but they are surely strong enough to demonstrate that the draftsmen of the Federal Rules acted responsibly when they adhered to the time-honored rule of the *McElroy* case. The misjoinder rule that they crafted is clear, and should be respected.[19] Misjoinder affects "substantial rights," and should lead to reversal.

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[14] See Field, Assessing the Harmlessness of Federal Constitutional Error—A Process in Need of a Rationale, 125 U. Pa. L. Rev. 15, 32 (1976) ("In sum, the case law on the content of the harmless error standard is less than lucid. There is some indication that Supreme Court opinions slip back and forth from one suggested standard to another, without explicit notice of the change, though the change could produce different results in many cases"); Saltzburg, The Harm of Harmless Error, 59 Va. L. Rev. 988 (1973) ("Chaos surrounds the standard for appellate review of errors in criminal proceedings"); Mause, Harmless Constitutional Error: The Implications of Chapman v. California, 53 Minn. L. Rev. 519, 557 (1969) ("the Court, if only in an effort to further the interest of net judicial economy, should attempt to delineate certain well-defined classes of constitutional error which require automatic reversal").

[15] In the constitutional area, the Court has made clear that certain independent values render a harmless-error analysis inappropriate. See, e. g., *Rose* v. *Mitchell*, 443 U. S. 545 (1979) (racial discrimination in the selection of a grand jury is not subject to harmless-error analysis); *Chapman*, 386 U. S., at 23 ("there are some constitutional rights so basic to a fair trial that their infraction can never be treated as harmless error"). Cf. *Rose* v. *Lundy*, 455 U. S. 509, 544 (1982) (STEVENS, J., dissenting) (some constitutional errors "are so fundamental that they infect the validity of the underlying judgment itself, or the integrity of the process by which that judgment was obtained").

[16] In *Holloway* v. *Arkansas*, 435 U. S. 475, 491 (1978), CHIEF JUSTICE BURGER explained that harmless error was inappropriate in assessing the constitutional error of inappropriate joint representation in part because such an inquiry required "unguided speculation." See also Note, 64 Cornell L. Rev., *supra* n. 13, at 563–564 ("*Holloway*'s rationale naturally extends beyond the sixth amendment: it suggests that a rule of automatic reversal should apply to those fundamental, pervasive errors that have uncertain prejudicial impact. . . . The rule of automatic reversal should be extended to all errors, whether or not pervasive or constitutional, that result in unascertainable prejudice") (footnotes omitted).

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[17] Cf. *Krulewitch* v. *United States*, 336 U. S. 440, 457–458 (1949) (Jackson, J., concurring) ("Few instruments of injustice can equal that of implied or presumed or constructive crimes. The most odious of all oppressions are those which mask as justice").

[18] See Note, 6 Hofstra L. Rev., *supra* n. 7, at 563 (harmless error "is inaccurate as a test for ascertaining the prejudice resulting from misjoinder because of the impossibility of determining the extent of that prejudice").

[19] The majority's suggestion that two Supreme Court opinions have held misjoinder subject to the harmless-error rule is erroneous. The majority writes, "A holding directly involving misjoinder again emphasized the harmless-error rule should apply." *Ante*, at 8. The decision cited by the majority for this proposition, *Schaffer* v. *United States*, 362 U. S. 511 (1960), explicitly found no Rule 8 error and explicitly disavowed the type of "emphasis" claimed by the majority. See 362 U. S., at 517 ("The harmless-error rule, which was the central issue in *Kotteakos*, is not even reached in the instant case, since here the joinder was proper under Rule 8(b) and no error was shown"). Thus, the majority's discussion of *Schaffer*, *ante*, at 8–9, is completely beside the point. Indeed, one year after *Schaffer* was decided, it was read to support, not the majority's conclusion, but the viability of the *McElroy* rule. See *Ward* v. *United States*, 289 F. 2d 877, 878 (CA D. C. 1961) (Burger, J.) (citing *Schaffer* and

III

Undertaking a harmless-error analysis is perhaps the least useful function that this Court can perform, cf. *United States* v. *Hasting*, 461 U. S. 499, 516–518 (1983) (STEVENS, J., concurring in judgment). For that reason, a decision that a harmless-error inquiry is required should lead to a remand to the Court of Appeals, which is in a far better position than we are to study the complete trial record with care. The majority's opinion in this case confirms the general advisability of that approach.

The Court's conclusion that Dennis Lane suffered no prejudice is based on three cursory observations. First, the Court asserts, with no explanation, that there was "overwhelming evidence" of his guilt. *Ante*, at 11. There are at least two problems with this observation. The first is that the majority fails to appreciate the *Kotteakos* recognition that the harmless-error inquiry is entirely distinct from a sufficiency-of-the-evidence inquiry.[20] The second is that, even

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McElroy to reject government suggestion that defendant must show prejudice to obtain reversal after misjoinder of defendants has been established).

Similarly, the majority's claim that *Kotteakos* "suggested that the harmless-error rule could similarly apply" to misjoinder, *ante*, at 8, vastly overstates the case. The Court noted that a possible joinder violation gave added weight to its conclusion that the error before it was *not* harmless. 328 U. S., at 774–775. The Court observed that "§ 269 [the harmless-error statute] carries the threat of overriding the requirement of § 557 for substituting separate counts in the place of separate indictments, unless the application of § 269 is made with restraint. The two sections must be construed and applied so as to bring them into substantial harmony, not into square conflict." *Id.*, at 775. This expression of concern about the possible effect of harmless error on misjoinder, however, hardly supports the notion that *Kotteakos* held misjoinder subject to harmless-error analysis. And, despite the majority's view that its holding is the only way to bring harmless error and misjoinder into "substantial harmony," *ante*, at 11, a conclusion that misjoinder necessarily affects substantial rights produces the same harmony.

[20] In *Kotteakos*, the Court accepted the defendants' concession that the evidence was not "insufficient, if considered apart from the alleged errors relating to the proof and the instructions at the trial." 328 U. S., at 753.

if it were faithfully applying the *Kotteakos* distinction between sufficiency of the evidence and harmless error, the majority utterly fails to explain its statement about "overwhelming evidence." A reading of *Kotteakos* reveals that only the most painstaking and thorough review of an entire trial record can justify a conclusion that its standard has, or has not, been met. The opinion the Court announces today contains no indication that it has made that kind of analysis of the case against Dennis Lane.[21]

Second, the Court notes that the jury was properly instructed to evaluate the evidence under each count and against each defendant separately. Since that instruction should be given routinely in every case in which there is a joinder of defendants or offenses, it surely cannot be regarded as an adequate response to a claim that a misjoinder was prejudicial.[22]

The Court went on to emphasize that the harmless-error analysis is fundamentally different from the sufficiency analysis. "The inquiry cannot be merely whether there was enough to support the result, apart from the phase affected by the error. It is rather, even so, whether the error itself had substantial influence. If so, or if one is left in grave doubt, the conviction cannot stand." *Id.*, at 765. Even though the evidence was concededly sufficient without the errors, the Court thus found the errors not harmless, and the convictions reversible. The majority quotes the relevant passage from *Kotteakos*, *ante*, at 10, but fails to reflect its principle in its analysis.

[21] The only specific evidence even mentioned by the majority—the testimony of Heard and Lankford, *ante*, at 12, n. 13—represents accomplice testimony. Such testimony is, of course, generally recognized as posing special evidentiary problems. See, *e. g.*, J. Weinstein & M. Berger, 1 Weinstein's Evidence (1985), § 107, pp. 50–51; S. Gard, 3 Jones on Evidence (1972), § 20, pp. 736–737.

[22] Indeed, in the year following *Kotteakos*, this Court made clear that proper jury instructions might not alleviate the problems inherent in joint trials:

"The grave danger in this case, if any, arose not from the trial court's rulings upon admissibility or from its instructions to the jury. As we have said, these were as adequate as might reasonably be required in a joint trial. The danger rested rather in the risk that the jury, in disregard of the court's direction, would transfer, consciously or unconsciously, the ef-

Finally, the Court rather hesitantly suggests that the evidence on Count I "would likely have been admissible" in a joint retrial on Counts 2–6, *ante*, at 11. The Court thus assumes that a joint retrial is inevitable. Of course, if misjoinder is found only as to Dennis Lane, as I suggest below, then the majority's point collapses. In any event, nothing in *Kotteakos* or in our harmless-error precedents suggests that this Court should find an error harmless because of the Court's completely untested speculations about a possible future retrial. Not surprisingly, *Kotteakos* suggests precisely the opposite.[23]

A determination that an error was harmless is an extremely weighty conclusion; it implicates profound notions of fairness and justice.[24] Even if the majority is correct that Rule 8 misjoinder should be subject to harmless-error analysis, I am convinced that the majority's summary finding of harmless error in this case fails to give the issue the attention it deserves.[25]

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fect of the excluded admissions from the case as made against Goldsmith and Weiss across the barrier of the exclusion to the other three defendants." *Blumenthal* v. *United States*, 332 U. S. 539, 559 (1947).

[23] "The Government's theory seems to be, in ultimate logical reach, that the error presented by the variance is insubstantial and harmless, if the evidence offered specifically and properly to convict each defendant would be sufficient to sustain his conviction, if submitted in a separate trial. For reasons we have stated and in view of the authorities cited, this is not and cannot be the test under § 269 [the harmless error statute]." 328 U. S., at 767.

[24] See R. Traynor, The Riddle of Harmless Error 80 (1970) ("the evaluation of an error as harmless or prejudicial is one of the most significant tasks of an appellate court, as well as one of the most complex. Each evaluation bears upon our traditional understanding that fair trial encompasses not only fair notice and an adequate opportunity to be heard before the appropriate tribunal, but also an orderly presentation of evidence and a rational application of the law thereto").

[25] A more searching review of the record might require the majority to confront certain troublesome aspects of this erroneous joinder. The majority might have to confront the fact that at least 9 of the Government's 26 witnesses—more than one third—addressed the El Toro fire, the offense

IV

I agree with the Court's conclusion that the evidence was sufficient to sustain both convictions of mail fraud and therefore join Part III of its opinion. I also agree with the judgment insofar as it upholds the conviction of James Lane. It is perfectly clear that the violation of Rule 8(b)—the rule prohibiting the improper joinder of *defendants*—occasioned by the misjoinder of Count I did not affect James Lane because he was the defendant in Count I. But since there is no claim that the son, Dennis Lane, took any part in Count I (the mail fraud regarding the 1979 El Toro Restaurant fire), I believe that his right not to be joined as a defendant in his father's trial for that felony was a "substantial right" that was adversely affected by the misjoinder.

In my view, the Court's opinion misconstrues the history and purpose of Rule 8, sows further confusion in the Court's harmless-error jurisprudence, and fails to make the kind of

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for which Dennis Lane was not charged. See Testimony of Morris Loewenstern, Tr. 33–43; Testimony of Earl Simpson, Tr. 44–50; Testimony of Cindy Wright, Tr. 58–59; Testimony of David Lard, Tr. 62–89, 96–103; Testimony of Ben Shaw, Tr. 103–112; Testimony of Jack Stotts, Tr. 113–123; Testimony of Wayne Cox, Tr. 123–132; Testimony of Jay Messenger, Tr. 139–157; and Testimony of Sidney Heard, Tr. 230–243. It might have to confront the fact that two of the defense witnesses similarly focused on the El Toro fire. See Testimony of Janie Malone, Tr. 681–736; Testimony of Jess Maddox, Tr. 891–894. It might have to confront the fact that, in their closing arguments, both the Government and the defense counsel devoted considerable attention to the El Toro fire. See Govt. closing arg., Tr. 989–993; Defense closing arg., Tr. 1008–1014. And it might, finally, have to confront the fact that the prosecutor's closing words to the jury were that "*each* of these charges has been proved against J. C. Lane *and Dennis Lane* beyond a reasonable doubt." Tr. 1051 (emphasis added).

This is not to say that I have studied the record with sufficient care to conclude that, if misjoinder is subject to harmless error analysis, the error here was not harmless. Rather, it is to say that I am convinced that the majority's opinion gives no indication of having wrestled with the complexities of the 1000-page trial transcript in a manner that would permit its confident assertion that the error was harmless.

harmless-error analysis that Rule 52(a) requires. Because I do not consider these errors harmless, I respectfully dissent from the judgment regarding Dennis Lane in 84–744.

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(Slip Opinion)

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Lumber Co.*, 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

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4137

ORIGINAL

Syllabus

BENDER ET AL. *v.* WILLIAMSPORT AREA SCHOOL DISTRICT ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 84–773. Argued October 15, 1985—Decided March 25, 1986

When a group of high school students in Williamsport, Pennsylvania, formed a club for the purpose of promoting "spiritual growth and positive attitudes in the lives of its members," they asked the Principal for permission to hold club meetings on the school premises during student activity periods. The matter was referred to the School Superintendent, who denied permission on the basis of an opinion of the School District Solicitor, and the School Board upheld the denial. The students then filed suit in Federal District Court against the School District, members of the School Board, the Superintendent, and the Principal, alleging that the refusal to allow the club to meet on the same basis as other student groups because of its religious activities violated the First Amendment, and seeking declaratory and injunctive relief. The District Court, on motions for summary judgment, ruled in the students' favor, but entered no injunction and granted no relief against any defendant in his individual capacity. The School District took no appeal, but complied with the judgment and allowed the students' club to conduct the meetings as requested. However, respondent Youngman (hereafter respondent), who was then still a member of the School Board, did appeal. No one raised any question about his standing to appeal, and the Court of Appeals held in his favor.

Held: Respondent had no standing to appeal, and therefore the Court of Appeals had no jurisdiction to hear his appeal. Pp. 6–14.

(a) Federal courts have only the power that is authorized by Article III of the Constitution and the federal statutes enacted pursuant thereto. Every federal appellate court must satisfy itself that the party seeking to invoke its jurisdiction has a sufficient stake in the outcome of the litigation to support that jurisdiction. Pp. 6–8.

Syllabus

(b) Respondent had no standing to appeal in his individual capacity. Although the complaint alleged that the action was brought against the defendants "in their individual and official capacities," there is nothing else in the complaint or in the record to support the suggestion that relief was sought or awarded against any School Board member in his *individual* capacity. P. 8.

(c) As a member of the School Board sued in his official capacity, respondent had no personal stake in the outcome of the litigation and therefore had no standing to appeal in that capacity. His status as a Board member did not permit him to "step into the shoes of the Board" and invoke its right to appeal. Pp. 9–10.

(d) Nor did respondent have standing to appeal in his capacity as a parent of a student attending the high school. There is nothing in the record to indicate anything about his status as a parent or to indicate that he or his children have suffered any injury as a result of the District Court's judgment or of the activities of the club in question subsequent to the entry of that judgment. Respondent was not sued as a parent and thus was plainly not a "party" in that capacity in the District Court. Pp. 11–14.

741 F. 2d 538, vacated and remanded.

STEVENS, J., delivered the opinion of the Court, in which BRENNAN, MARSHALL, BLACKMUN, and O'CONNOR, JJ., joined. MARSHALL, J., filed a concurring opinion. BURGER, C. J., filed a dissenting opinion, in which WHITE and REHNQUIST, JJ., joined. POWELL, J., filed a dissenting opinion.

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D. C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

No. 84-773

MICHAEL BENDER, ET AL., PETITIONERS *v.* WILLIAMSPORT AREA SCHOOL DISTRICT ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

[March 25, 1986]

JUSTICE STEVENS delivered the opinion of the Court.

This case raises an important question of federal appellate jurisdiction that was not considered by the Court of Appeals: Whether one member of a School Board has standing to appeal from a declaratory judgment against the Board. We conclude that although the School Board itself had a sufficient stake in the outcome of the litigation to appeal, an individual Board member cannot invoke the Board's interest in the case to confer standing upon himself.

I

In September 1981 a group of high school students in Williamsport, Pennsylvania, formed a club called "Petros" for the purpose of promoting "spiritual growth and positive attitudes in the lives of its members." App. 46. The group asked the Principal of the high school for permission to meet on school premises during student activity periods scheduled during the regular schoolday on Tuesdays and Thursdays. The Principal allowed Petros to hold an organizational meeting that was attended by approximately 45 students. At that meeting passages of scripture were read and some students prayed. There is no evidence that any students, or parents, expressed any opposition or concern about future meetings of Petros. The Principal nevertheless advised the group that they could not hold any further meetings until he had discussed the matter with the School Superintendent. The Superintendent, in turn, advised the students that he would respond to their written request for recognition after he received "competent legal advice [from the School District's Solicitor] as to the propriety of approving establishment of the proposed prayer club" on school premises. *Id.*, at 42.

On November 16, 1981, the Principal and the Superintendent met with representatives of Petros and advised them that "based on the Solicitor's legal opinion, their request must be denied." 563 F. Supp. 697, 701 (MD Pa. 1983). The legal opinion is not a part of the record; nor does the record contain any evidence that the Principal, the Superintendent, or any other person except the Solicitor had voiced any opposition to the proposed meetings by Petros. Indeed, Petros was informed that it could meet off school premises and "would be given released time during the activity period" if it could secure "a location and an adult supervisor, preferably a clergyman" for their meetings. *Ibid.*

The students thereafter wrote a letter to the Chairman of the Williamsport Area School Board appealing the Superintendent's decision. At a meeting held January 19, 1982, the Board upheld the Superintendent's decision and "denied the appeal on the basis of the Solicitor's opinion." *Ibid.* (citations omitted).

II

On June 2, 1982, 10 of the students filed suit in the United States District Court against the Williamsport Area School District, the 9 members of the School Board, the Superintendent of the District, and the Principal of the high school. Although there is a general allegation in the first paragraph of the complaint that the action was brought against the defendants "in their individual and official capacities," App. 13, the specific allegation concerning each of the named members of the Board was in this form: "John C. Youngman, Jr., is a member of the Williamsport Area School Board and is sued in that capacity," *id.*, at 16. The complaint alleged that the defendants' refusal to recognize "Petros" and to allow it to meet on the same basis as other student groups because of its religious activities violated the First Amendment. The complaint prayed for declaratory and injunctive relief.

One answer was filed on behalf of all the defendants. Although they admitted most of the material allegations of the complaint, they alleged that they had "requested and received in writing an opinion from the school district solicitor and legal counsel that it would be unlawful, improper and unconstitutional to recognize said group as a student organization." *Id.*, at 33.

After plaintiffs completed their discovery (defendants took no depositions), the parties filed cross-motions for summary judgment supported by affidavits, the deposition testimony, and statements of material fact not in dispute. On November 9, 1982, the District Court entered an order finding that the record was incomplete. It thereupon directed the parties to submit affidavits or other documentation concerning "the exact nature of the activity period, the type of activities or clubs that have been, and would be, approved, and what proposed groups, if any, have been denied approval." *Id.*, at 101. After that additional information was supplied, and after the case had been fully briefed, the District Court on May 12, 1983, filed a detailed and carefully written opinion in which it stated:

> "Presently before the court are the parties' cross-motions for summary judgment. . . . Although the case presents only a question of law, this is not to say that the facts are unimportant. On the contrary, the undisputed facts are of paramount importance to the resolution of the legal question presented in this case. A slight change in the facts could very well have dictated a contrary decision.
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> "After carefully reviewing those facts, and after giving full consideration to all pertinent legal authority, the

> court concludes that because the defendant school district is not constitutionally required to deny the plaintiffs the opportunity to meet, by doing so solely on constitutional grounds it has impermissibly burdened their free-speech rights. Accordingly, summary judgment will be granted in favor of the plaintiffs." 563 F. Supp., at 699–700.

The final order entered by the District Court was a ruling "in favor of the plaintiffs and against the defendants on plaintiffs' freedom of speech claim."[1] No injunction was entered, and no relief was granted against any defendant in his individual capacity. The District Court, in effect, merely held that the Board's attorney was incorrect in his legal advice.

The School District did not challenge the judgment of the District Court in any way. It made no motion for a stay and took no appeal. Instead, it decided to comply with the judgment and to allow Petros to conduct the meetings it had requested.

However, John C. Youngman, Jr., who was then still a member of the Board, did file a timely notice of appeal.[2]

III

In the Court of Appeals no one raised any question about Mr. Youngman's standing to appeal. The court did note that all of the original plaintiffs had graduated from high school, but it granted a motion to add additional plaintiffs who were currently enrolled students in order to prevent the case from becoming moot. 741 F. 2d 538, 542, n. 4 (CA3 1984). Neither the majority nor the dissenting opinion even mentioned Mr. Youngman.

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[1] The full text of the Court's order read as follows:

"NOW, this 12th day of May, 1983, in accordance with the reasoning set forth in the accompanying Opinion, it is hereby ordered that:

"(1) Summary judgment is granted in favor of the defendants and against the plaintiffs on plaintiffs' free exercise claim;

"(2) Summary judgment is granted in favor of the plaintiffs and against the defendants on plaintiffs' freedom of speech claim; and,

"(3) The Clerk of the Court shall close this case." App. to Pet. for Cert. 105a.

[2] We are advised that his term of office expired while the case was pending before the Court of Appeals.

After repeatedly stressing "the crucial role which the particular facts play in every first amendment analysis," *id.*, at 541–542,[3] the majority of the Court of Appeals held "that the particular circumstances disclosed by this record and present at the Williamsport Area High School lead to the inexorable conclusion that the constitutional balance of interests tilts against permitting the Petros activity to be conducted within the school as a general activity program," *id.*, at 561.

In dissent, Judge Adams suggested that the majority had implicitly adopted a *per se* rule because of its concern about "the possibility of unconstitutional extensions of the Williamsport arrangement elsewhere," instead of performing the "more difficult adjudicative task [of carefully sifting the facts] on a case-by-case basis." *Id.*, at 569.

The importance of the question presented by the students' petition for certiorari persuaded us that the case merited plenary review. 469 U. S. —— (1985). After granting certiorari, however, we noticed that neither the Board nor any of the defendants except Mr. Youngman opposed the students' position and that only Mr. Youngman had challenged the District Court's judgment by invoking the jurisdiction of the Court of Appeals. We therefore find it necessary to answer the question whether Mr. Youngman had a sufficient stake in the outcome of the litigation to support appellate jurisdiction. The parties and the *amici* have identified three different capacities in which Mr. Youngman may have had standing to appeal—as an individual, as a member of the Board, and as a parent.

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[3] In this regard, consider also the Court of Appeals' emphasis on "the specific facts of the case," 741 F. 2d, at 559 (emphasis deleted); its statement that the "facts of this case concededly present a close question," *ibid.*; its reference to "the unique situation presented here," *id.*, at 559, n. 28; and the following statement:

"Because each additional fact and factor impacts so heavily upon a school prayer analysis in a determination as to whether the particular circumstances pass constitutional muster, we feel it necessary to be precise in considering the relevant facts leading to a particular conclusion." *Id.*, at 560, n. 30.

IV

Before considering each of the standing theories, it is appropriate to restate certain basic principles that limit the power of every federal court. Federal courts are not courts of general jurisdiction; they have only the power that is authorized by Article III of the Constitution and the statutes enacted by Congress pursuant thereto. See, *e. g.*, *Marbury* v. *Madison*, 1 Cranch 137, 173–180 (1803). For that reason, every federal appellate court has a special obligation to "satisfy itself not only of its own jurisdiction, but also that of the lower courts in a cause under review," even though the parties are prepared to concede it. *Mitchell* v. *Maurer*, 293 U. S. 237, 244 (1934). See *Juidice* v. *Vail*, 430 U. S. 327, 331–332 (1977) (standing). "And if the record discloses that the lower court was without jurisdiction this court will notice the defect, although the parties make no contention concerning it. [When the lower federal court] lack[s] jurisdiction, we have jurisdiction on appeal, not of the merits but merely for the purpose of correcting the error of the lower court in entertaining the suit." *United States* v. *Corrick*, 298 U. S. 435, 440 (1936) (footnotes omitted).[4]

This obligation to notice defects in a court of appeals' subject-matter jurisdiction assumes a special importance when a constitutional question is presented. In such cases we have strictly adhered to the standing requirements to ensure that our deliberations will have the benefit of adversary presentation and a full development of the relevant facts.[5] Thus, as we emphasized in *Valley Forge Christian College* v. *Americans United for Separation of Church and State, Inc.*, 454 U. S. 464, 472 (1982):

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[4] See also, *e. g.*, *Sumner* v. *Mata*, 449 U. S. 539, 547–548, n. 2 (1981); *City of Kenosha* v. *Bruno*, 412 U. S. 507, 511 (1973); *Clark* v. *Paul Gray, Inc.*, 306 U. S. 583, 588 (1939); *St. Paul Mercury Indemnity Co.* v. *Red Cab Co.*, 303 U. S. 283, 287–288, n. 10 (1938); *Stratton* v. *St. Louis Southwestern R. Co.*, 282 U. S. 10, 13 (1930); *Louisville & Nashville R Co.* v. *Mottley*, 211 U. S. 149, 152 (1908) (citing cases); *Cameron* v. *Hodges*, 127 U. S. 322, 325 (1888). Cf. *Capron* v. *Van Noorden*, 2 Cranch 126, 127 (1804).

> "[A]t an irreducible minimum, Art. III requires the party who invokes the court's authority to 'show that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant,' *Gladstone, Realtors* v. *Village of Bellwood*, 441 U. S. 91, 99 (1979), and that the injury 'fairly can be traced to the challenged action' and 'is likely to be redressed by a favorable decision,' *Simon* v. *Eastern Kentucky Welfare Rights Org.*, 426 U. S. 26, 38, 41 (1976). . . .
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> . . . . .
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> "The requirement of 'actual injury redressable by the court,' *Simon,* v. [*Eastern Kentucky Welfare Rights Org.*, 426 U. S. 26], at 39 [1976], serves several of the 'implicit policies embodied in Article III,' *Flast* [v. *Cohen*, 392 U. S. 83,] 96 [(1968)]. It tends to assure that the legal questions presented to the court will be resolved, not in the rarified atmosphere of a debating society, but in a concrete factual context conducive to a realistic appreciation of the consequences of judicial action. The 'standing' requirement serves other purposes. Be-

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[5] We have frequently recognized the importance of the facts and the factfinding process in constitutional adjudication. See, *e. g., Minnick* v. *California Dept. of Corrections*, 452 U. S. 105, 120–127 (1981); *England* v. *Louisiana Board of Medical Examiners*, 375 U. S. 411, 416 (1964) ("How the facts are found will often dictate the decision of federal claims"); *Townsend* v. *Sain*, 372 U. S. 293, 312 (1963) ("It is the typical, not the rare, case in which constitutional claims turn upon the resolution of contested factual issues"). Cf. *supra*, at 3–5, and n. 3.

> cause it assures an actual factual setting in which the litigant asserts a claim of injury in fact, a court may decide the case with some confidence that its decision will not pave the way for lawsuits which have some, but not all, of the facts of the case actually decided by the court."

V

The first paragraph of the complaint alleged that the action was brought against the defendants "in their individual and official capacities." App. 13. There is, however, nothing else in the complaint, or in the record on which the District Court's judgment was based, to support the suggestion that relief was sought against any School Board member in his or her *individual* capacity. Certainly the District Court's judgment granted no such relief. See n. 1, *supra*. Accordingly, to paraphrase our holding in *Brandon* v. *Holt*, 469 U. S. —, — (1985) (slip op. 5), "[t]he course of proceedings . . . make it abundantly clear that the action against [Mr. Youngman] was in his official capacity and only in that capacity." See *Kentucky* v. *Graham*, 473 U. S. —, —, n. 14 (1985) (slip op. 8, n. 14). Since the judgment against Mr. Youngman was not in his individual capacity, he had no standing to appeal in that capacity.[6]

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[6] The fact that Mr. Youngman was sued in his official capacity does not give him standing to appeal in his individual capacity. Acts performed by the same person in two different capacities "are generally treated as the transactions of two different legal personages." F. James & G. Hazard, Civil Procedure § 11.6, p. 594 (3d ed. 1985).

The fact that Mr. Youngman is named in a petition for attorney's fees that was filed in the District Court after the appeal was taken clearly cannot affect his standing to appeal. Moreover, as we held in *Kentucky* v. *Graham*, 473 U. S., at — (footnote and citation omitted) (slip op. 5), "liability on the merits and responsibility for fees go hand in hand; where a defendant has not been prevailed against, either because of legal immunity or on the merits, 42 U. S. C. § 1988 does not authorize a fee award against that defendant." Accord, *id.*, at —, — - — (slip op. 4–5, 9–11).

VI

As a member of the School Board sued in his official capacity Mr. Youngman has no personal stake in the outcome of the litigation and therefore did not have standing to file the notice of appeal. As we held in *Brandon* v. *Holt*, *supra*, "a judgment against a public servant 'in his official capacity' imposes liability on the entity that he represents provided, of course, the public entity received notice and an opportunity to respond." *Id.*, at —— (slip op. 7). We repeated this point in *Kentucky* v. *Graham*:

> "Official-capacity suits . . . 'generally represent only another way of pleading an action against an entity of which an officer is an agent.' *Monell* v. *New York City Dept. of Social Services*, 436 U. S. 658, 690, n. 55 (1978). As long as the government entity receives notice and an opportunity to respond, an official-capacity suit is, in all respects other than name, to be treated as a suit against the entity. *Brandon*, *supra*, at ——. It is *not* a suit against the official personally, for the real party in interest is the entity. Thus, while an award of damages against an official in his personal capacity can be executed only against the official's personal assets, a plaintiff seeking to recover on a damages judgment in an official-capacity suit must look to the government entity itself." 473 U. S., at —— (emphasis in original, footnote omitted) (slip op. 6).

Mr. Youngman's status as a School Board member does not permit him to "step into the shoes of the Board" and invoke its right to appeal. In this case, Mr. Youngman was apparently the lone dissenter in a decision by the other eight members of the School Board to forgo an appeal. Tr. of Oral Arg. 7. Generally speaking, members of collegial bodies do not have standing to perfect an appeal the body itself has declined to take.[7] The Court of Appeals for the District of Columbia so held in *Smuck* v. *Hobson*, 132 U. S. App. D. C. 372, 374–375, 408 F. 2d 175, 177–178 (1969) (en banc) (footnote omitted):

> "We also find that Mr. Smuck has no appealable interest as a member of the Board of Education. While he was in that capacity a named defendant, the Board of Education was undeniably the principal figure and could have been sued alone as a collective entity. Appellant Smuck had a fair opportunity to participate in its defense, and in the decision not to appeal. Having done so, he has no separate interest as an individual in the litigation. The order directs the Board to take certain actions. But since its decisions are made by vote as a collective whole, there is no apparent way in which Smuck as an individual could violate the decree and thereby become subject to enforcement proceedings."

See *id.*, at 387, 408 F. 2d, at 190 (McGowan, J., concurring in part and concurring in result).

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[7] It might be an entirely different case if, for example, state law authorized School Board action solely by unanimous consent, in which event Mr. Youngman might claim that he was legally entitled to protect "the effectiveness of [his] vot[e]." *Coleman* v. *Miller*, 307 U. S. 433, 438 (1939). See *id.*, at 438–446; *id.*, at 456 (Black, J., concurring). But in that event Mr. Youngman would have to allege that his vote was diluted or rendered nugatory under state law and even then he would have a mandamus or like remedy against the Secretary of the School Board, cf. *id.*, at 436–437 (mandamus action "to compel a proper record of legislative action"); he would not be entitled to take legal action in the Board's authority in his own name. For the same reason, Mr. Youngman does not have standing on the rationale employed in *Allen* v. *Board of Education*, 392 U. S. 236, 241, n. 5 (1968), that he was forced to violate his constitutional oath. Unlike the members of the school board *majority* in *Allen* who were put "in the position of having to choose between violating their oath and taking a step . . . that would be likely to bring their expulsion from office and also a reduction in state funds for their school districts," *ibid.*, Mr. Youngman has voted his conscience and, as a member of the Board, must abide by its decision not to appeal absent some state-law provision to the contrary.

AVAILABLE

VII

At oral argument Mr. Youngman advised the Court that he is the parent of at least one student attending the Williamsport Area High School and that as a matter of conscience he is opposed to prayer activities on school premises during regular school hours. The Solicitor General submits that Mr. Youngman's status as a parent provides an adequate predicate for federal appellate jurisdiction.

Mr. Youngman's status as an aggrieved parent, however, like any other kindred fact showing the existence of a justiciable "case" or "controversy" under Art. III, must affirmatively appear in the record.[8] As the first Justice Harlan observed, "the presumption . . . is that the court below was without jurisdiction" unless "the contrary appears affirmatively from the record." *King Bridge Co.* v. *Otoe County*, 120 U. S. 225, 226 (1887). Accord, *Thomas* v. *Board of Trustees*, 195 U. S. 207, 210 (1904); *Minnesota* v. *Northern Securities Co.*, 194 U. S. 48, 62–63 (1904). That lack of standing was not noticed by either party matters not, for as we said in *Mansfield C. & L. M. R. Co.* v. *Swan*, 111 U. S. 379, 382 (1884):

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[8] "The rules of standing, whether as aspects of the Art. III case-or-controversy requirement or as reflections of prudential considerations defining and limiting the role of the courts, are threshold determinants of the propriety of judicial intervention. It is the responsibility of the complainant clearly to allege facts demonstrating that he is a proper party to invoke judicial resolution of the dispute and the exercise of the court's remedial powers." *Warth* v. *Seldin*, 422 U. S. 490, 517–518 (1975). See *McNutt* v. *General Motors Acceptance Corp.*, 298 U. S. 178, 190 (1936) ("Here, the allegation in the bill of complaint as to jurisdictional amount was traversed by the answer. The court made no adequate finding upon that issue of fact, and the record contains no evidence to support the allegation of the bill. There was thus no showing that the District Court had jurisdiction and the bill should have been dismissed upon that ground"); *Jackson* v. *Ashton*, 8 Pet. 148, 149 (1834); *Bingham* v. *Cabot*, 3 Dall. 382, 383–384 (1798).

> "[T]he rule, springing from the nature and limits of the judicial power of the United States, is inflexible and without exception, which requires this court, of its own motion, to deny its own jurisdiction, and, in the exercise of its appellate power, that of all other courts of the United States, in all cases where such jurisdiction does not affirmatively appear in the record on which, in the exercise of that power, it is called to act. On every writ of error or appeal, the first and fundamental question is that of jurisdiction, first, of this court, and then of the court from which the record comes. This question the court is bound to ask and answer for itself, even when not otherwise suggested, and without respect to the relation of the parties to it."

Accord, *Chi., B. & Q. Ry. Co.* v. *Willard*, 220 U. S. 413, 419 (1911); *Kentucky* v. *Powers*, 201 U. S. 1, 35–36 (1906); *Great Southern Fire Proof Hotel Co.* v. *Jones*, 177 U. S. 449, 453 (1900). See *Thomson* v. *Gaskill*, 315 U. S. 442, 446 (1942). Moreover, because it is not "sufficient that jurisdiction may be inferred argumentatively from averments in the pleadings," *Grace* v. *American Central Ins. Co.*, 109 U. S. 278, 284 (1883); *Thomas* v. *Board of Trustees*, 195 U. S., at 210, it follows that the necessary factual predicate may not be gleaned from the briefs and arguments themselves. This "first principle of federal jurisdiction" applies "whether the case is at the trial stage or the appellate stage." P. Bator, P. Mishkin, D. Shapiro, & H. Wechsler, Hart and Wechsler's The Federal Courts and the Federal System 835–836 (2d ed. 1973).

There is nothing in the record indicating anything about Mr. Youngman's status as a parent. Nor is anything in the record to indicate that he or his children have suffered any injury as a result of the District Court's judgment, or as a result of the activities of Petros subsequent to the entry of that judgment. For all that appears in the record, Mr.

Youngman and his children might even be active supporters of Petros.

The reasons why Mr. Youngman may not take an appeal in his individual capacity also foreclose an appeal in his capacity as a parent. His interest as a parent in the outcome of the litigation differs from his interest as a member of the School Board which, as we have already noted, is legally that of a "different legal personage." See n. 6, *supra*. Since Mr. Youngman was not sued as a parent in the District Court, he had no right to participate in the proceedings in that court in that capacity without first filing an appropriate motion or pleading setting forth the claim or defense that he desired to assert.[9] Thus, even if one were amenable to the dissent's unprecedented (and unexplained) suggestion that the principle governing determination of subject matter jurisdiction should be relaxed on appeal, the proposed exception for litigants who were "proper part[ies]" in the district court, *post*, at 2, would not help Mr. Youngman because he could not perfect an appeal in either capacity in which he was a "party" in the District Court, *i. e.*, as a School Board member sued in his individual capacity or as a Board member sued in his official capacity. Tacitly conceding Mr. Youngman's lack of standing on these two bases, the dissent instead would confer standing on Mr. Youngman as a parent—a capacity in which he plainly was not a party in the District Court and to which, therefore, the dissent's reasoning does not apply. Having failed to assert his parental interest in the District Court—or to adduce any factual support for that interest in this Court—Mr. Youngman has no right to prosecute an appeal in his capacity as a parent.

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[9] Because his status as a parent was obviously different from his official status as a member of the Board, in order to participate as a parent in the District Court litigation it was incumbent upon Mr. Youngman under Rule 24 of the Federal Rules of Civil Procedure to make "timely application" by an appropriate motion "stat[ing] the grounds" for intervention and "setting forth the claim or defense for which intervention is sought." Fed. Rule Civ. Proc. 24(a), (c). No such pleading was filed in either of the courts below. It is particularly important to observe these requirements in cases in which the interest of the litigant seeking to appeal diverges from the interest of the party to the suit. In this case, Mr. Youngman's interest as a parent was not necessarily parallel to the interest of the School Board. For although the record plainly demonstrates that the School Board was interested in obeying the law—it dutifully followed its lawyer's advice when he concluded that group worship conducted on school premises would violate the Establishment Clause—it also decided not to appeal the District Court's contrary ruling, and the record does not indicate that the Board disfavored (or favored) groups such as Petros.

We therefore hold that because the Court of Appeals was without jurisdiction to hear the appeal, it was without authority to decide the merits. Accordingly, the judgment of the Court of Appeals is vacated, and the case is remanded with instructions to dismiss the appeal for want of jurisdiction.

It is so ordered.

SUPREME COURT OF THE UNITED STATES

No. 84-773

MICHAEL BENDER, ET AL., PETITIONERS *v.* WILLIAMSPORT AREA SCHOOL DISTRICT ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

[March 25, 1986]

JUSTICE MARSHALL, concurring.

I join JUSTICE STEVENS' opinion for the Court. I write separately to emphasize that the parties cannot, as the Solicitor General and THE CHIEF JUSTICE contend, invoke the Article III jurisdiction of this Court through a belated nontestimonial statement by Mr. Youngman that he is a parent of a child in the Williamsport Area High School.

This lawsuit on appeal was *not* "the same dispute between the same parties," *post*, at 2, as the one conducted in the District Court. The dispute litigated in the District Court was one between certain students wishing to conduct prayer group activities as part of an official school activity period, on the one hand, and a school board that refused them permission to do so, on the other. Mr. Youngman participated in that lawsuit only as a member of the school board, sued in his official capacity. The real party in interest in that lawsuit was the board. *Kentucky* v. *Graham*, 473 U. S. ——, —— (1985). That controversy ended with the entry of the District Court judgment; the school board, voting 8-1 with Mr. Youngman in the minority, abandoned its earlier position and agreed to allow plaintiffs to conduct the prayer group activities they sought. There was therefore nothing left to litigate between those parties.

The lawsuit sought to be litigated on appeal is a different one. This dispute, under THE CHIEF JUSTICE's theory, is one between Mr. Youngman, asserting that he is a parent of a child in the Williamsport Area High School whose First Amendment rights would be infringed by his attendance at a school whose activities impermissibly advance religion, on the one hand, and students seeking to conduct prayer group activities, on the other. The school board itself is nowhere to be found. I do not contest that Mr. Youngman could pursue this dispute on appeal had he intervened in the lawsuit in his capacity as a parent. Absent such intervention, it is conceivable that Mr. Youngman might bottom his standing to raise such an argument on facts in the record setting out his status as a parent. There are, however, no such facts anywhere in the extensive record in this case. There is not one word in the record indicating that Mr. Youngman is a father at all. Nor did Mr. Youngman claim such status in his Notice of Appeal. App. 166.

In fact, the Brief for Respondent filed in this Court suggests that Mr. Youngman did *not* have a child in the Williamsport Area High School when he filed his notice of appeal from the District Court's decision on June 10, 1983. Benjamin Youngman, rather, apparently is claimed to have begun studying at that school several months later, in the fall of 1983. Brief for Respondent at 6, and n. 3. Assertions in the parties' briefs are not part of the record for purposes of determining our jurisdiction. This discrepancy, however, illustrates the wisdom of our long-established rule requiring that the facts supporting our Article III jurisdiction "appea[r] affirmatively from the record." *King Bridge Co.* v. *Otoe County*, 120 U. S. 225, 226 (1887).

Because no facts appear in the record supporting Mr. Youngman's status as the parent of a child enrolled in the Williamsport Area High School opposed to petitioners' activities, I join the opinion and judgment of the Court vacating the judgment below and remanding with instructions to dismiss the appeal for want of jurisdiction.

SUPREME COURT OF THE UNITED STATES

No. 84-773

MICHAEL BENDER, ET AL., PETITIONERS *v.* WILLIAMSPORT AREA SCHOOL DISTRICT ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

[March 25, 1986]

CHIEF JUSTICE BURGER, with whom JUSTICE WHITE and JUSTICE REHNQUIST join, dissenting.

I agree with the Court that the judgment of the District Court allowing Petros to meet during the student extracurricular activity period must be reinstated. Because Respondent Youngman had standing to appeal, however, I would reach the merits of this dispute and reverse the judgment of the Court of Appeals.

I

Mr. Youngman is a parent of a student at Williamsport High School; as a matter of conscience he is opposed to prayer activities on school premises during school hours. As this Court has repeatedly held, parents have standing to challenge conditions in public schools that their children attend. See *Engel* v. *Vitale*, 370 U. S. 421 (1962); *Zorach* v. *Clauson*, 343 U. S. 306 (1952). The Court's principal objection to Youngman's standing as a parent stems from his failure "'to allege facts demonstrating that he is a proper party to invoke judicial resolution of the dispute and the exercise of the court's remedial powers.'" *Ante*, at 11 and n. 8 (quoting *Warth* v. *Seldin*, 422 U. S. 490, 518 (1975)). It is, of course, perfectly sensible to impose such pleading burdens upon the plaintiff who initiates the litigation. These burdens, however, need not be placed upon a properly named defendant, like Mr. Youngman, who seeks to invoke the jurisdiction of the Court of Appeals. Once the jurisdiction of the District Court over a particular dispute is established, it seems clear that the same dispute between the same parties will remain within the Article III powers of the courts on appeal. To be sure, we require that the case-or-controversy requirement be met throughout the course of the litigation. But the method for determining whether the case-or-controversy exists and the burdens placed on the parties should not, indeed cannot, be the same on appeal as in the District Court. At the District Court stage, the facts required by *Warth*, *supra*, should normally appear on the face of the complaint. At the appellate stage, however, the "complaining party" does not allege any facts but merely identifies himself as a party to the case in the District Court and challenges the validity of that decision. Only if the appellant's standing is challenged must he allege facts sufficient to convince the Court of Appeals that he is a proper party to pursue the appeal. Here, petitioners not only failed to challenge Youngman's standing before the Court of Appeals, they also conceded that, had they challenged Youngman's standing, he would have satisfied the *Warth* standing test. Tr. of Oral Arg. 5.

II

I would reach the issue the Court granted certiorari to address: whether the Establishment Clause requires a public high school to prevent a student-initiated, student-led group from meeting during an extracurricular activity period.

The Establishment Clause prohibits Congress and, through the Fourteenth Amendment, the States from passing any law "respecting an establishment of religion." As we have observed on other occasions, the precise contours of this prohibition remain unclear. But it is common ground that nothing in the Establishment Clause requires the State to suppress a person's speech merely because the *content* of the speech is religious in character. In *McDaniel* v. *Paty*, 435 U. S. 618, 641 (1978), JUSTICE BRENNAN emphasized in his opinion concurring in the judgment that "[t]he Establishment Clause does not license government to treat religion and those who teach or practice it, simply by virtue of their status as such, as subversive of American ideals and therefore subject to unique disabilities." And more recently, in *Widmar* v. *Vincent*, 454 U. S. 263 (1981), we held that the Establishment Clause did not justify a university's content-based exclusion of religious speech from a forum generally open to student groups.

Widmar clearly controls the resolution of this case. Petros is a student-initiated and student-led group seeking the same forum available to other student extracurricular activity groups. The students would have been allowed to meet to discuss moral philosophy or Marxism, to practice French, or to play chess; but, since they chose to worship, the school decided that it could not allow the group to meet without violating the Establishment Clause.

The Court of Appeals agreed that the Establishment Clause prohibited Petros from meeting on school premises because to allow them to meet could have been misinterpreted by other students as active state support of religion. Under that analysis, because an individual's discussion of religious beliefs may be confused by others as being that of the State, both must be viewed as the same. Yet the several commands of the First Amendment require vision capable of distinguishing between *state* establishment of religion, which is prohibited by the Establishment Clause, and *individual* participation and advocacy of religion which, far from being prohibited by the Establishment Clause, is affirmatively protected by the Free Exercise and Free Speech Clauses of the First Amendment. If the latter two commands are to retain any vitality, utterly unproven, subjective impressions of some hypothetical students should not be allowed to transform *individual* expression of religious belief into *state* advancement of religion.

No one would contend that the State would be authorized to dismantle a church erected by private persons on private property because overwhelming evidence showed that other members of the community *thought* the church was owned and operated by the State. That the "primary effect" of state inaction might turn out to advance the cause of organized religion has no bearing upon the threshold question of whether the challenged activity is conducted by the State or by individuals.

The Establishment Clause mandates state neutrality, not hostility, toward religion. As Justice Black stated for the Court in *Everson* v. *Board of Education*, 330 U. S. 1, 18 (1947), the First Amendment "requires the state to be neutral in its relations with groups of religious believers and non-believers; it does not require the state to be their adversary. State power is no more to be used so as to handicap religions than it is to favor them." In *Zorach* v. *Clauson*, 343 U. S. 306 (1952), the Court upheld a state law allowing schools to release students, during school hours, so that they could receive religious instruction elsewhere. Although the State did not compel students to go to religious classes, the program undoubtedly advanced the cause of religion. Justice Douglas, writing for the Court, eloquently rejected the suggestion that the program thereby violated the Establishment Clause:

> "We are a religious people whose institutions presuppose a Supreme Being. We guarantee the freedom to worship as one chooses. We make room for as wide a variety of beliefs and creeds as the spiritual needs of man deem necessary. We sponsor an attitude on the part of government that shows no partiality to any one group and that lets each flourish according to the zeal of its adherents and the appeal of its dogma. When the state encourages religious instruction or cooperates with religious authorities by adjusting the schedule of public events to sectarian needs, it follows the best of our tradi-

> tions. For it then respects the religious nature of our people and accommodates the public service to their spiritual needs. To hold that it may not would be to find in the Constitution a requirement that the government show a callous indifference to religious groups." *Id.*, at 313–314.

By granting the student prayer group equal access to the student activity forum, the order of the District Court "follows the best of our traditions," *id.*, at 314, and is wholly consistent with the Constitution. Although I would have reached this issue on the merits, it is appropriate that the Court, by vacating the judgment of the Court of Appeals, restores the sound analysis and judgment of the District Court.

SUPREME COURT OF THE UNITED STATES

No. 84-773

MICHAEL BENDER, ET AL., PETITIONERS *v.* WILLIAMSPORT AREA SCHOOL DISTRICT ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

[March 25, 1986]

JUSTICE POWELL, dissenting.

I agree with THE CHIEF JUSTICE that respondent has standing to appeal, and also agree with much of his dissenting opinion. I write briefly to say that on its merits, this case is controlled by *Widmar* v. *Vincent*, 454 U. S. 263 (1981).

As in that case, respondent School District simply had "created a forum generally open for use by student groups." *Id.*, at 267. The School District provided thirty-minute periods on Tuesdays and Thursdays for high school students to meet in groups in separate school rooms for extracurricular activities, including discussion or debate on any subject of their choosing. A religious group was formed for reading passages of scripture and for prayer. Although there were no complaints by students, faculty, or parents, on the basis of a legal opinion the principal advised the group that it could not meet during these periods. As THE CHIEF JUSTICE observes in his dissent, this is "a student-initiated and student-led group seeking the same forum available to other student extracurricular activity groups." *Ante*, at 3. At the time of this suit, there was a total of twenty-five identified groups, each organized by students. All of these groups were free to discuss any subject other than a religious one.

In *Widmar*, under essentially the same circumstances, we held that the University of Missouri at Kansas City had "discriminated against student groups and speakers based on their desire to use a generally open forum to engage in religious worship and discussion. These are forms of speech and association protected by the First Amendment." 454 U. S., at 269. The only arguable distinction between *Widmar* and this case is that *Widmar* involved university students while the groups here are composed of high school students. We did note in *Widmar* that university students are "less impressionable than younger students and should be able to appreciate that the University's policy is one of neutrality to a religion." *Id.*, at 274, n. 14. Other decisions, however, have recognized that the First Amendment rights of speech and association extend also to high school students. See, *e. g.*, *Board of Education* v. *Pico*, 457 U. S. 853, 864 (1982) (opinion of BRENNAN, J.); *Tinker* v. *Des Moines School District*, 393 U. S. 503, 506–507 (1969) (citing cases). I do not believe—particularly in this age of massive media information—that the few years difference in age between high school and college students justifies departing from *Widmar*. I accordingly dissent.

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JU 6.8/b:985/84-782

(Slip Opinion)

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Lumber Co.*, 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

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Syllabus

SOUTH CAROLINA ET AL. *v.* CATAWBA INDIAN TRIBE OF SOUTH CAROLINA

CONTIN

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 84-782. Argued December 12, 1985—Decided June 2, 1986

In 1760 and 1763, respondent Indian Tribe surrendered to Great Britain its aboriginal territory in return for the right to settle permanently on a 225-square-mile tract of land now located in South Carolina. In 1840, the Tribe conveyed the tract to South Carolina in return for the State's establishing a new reservation for the Tribe. In 1959, Congress, pursuant to its changed policies concerning Indian affairs, enacted the Catawba Indian Tribe Division of Assets Act (Catawba Act) authorizing a division of Catawba tribal assets. Section 5 of that Act provided for revocation of the Tribe's constitution, rendered inapplicable to the Tribe and its members special federal statutory protections for Indians, and made state laws applicable to the Tribe and its members in the same way that they apply to all "other persons or citizens." In 1980, the Tribe brought an action in Federal District Court against petitioners (South Carolina and other claimants to the 225-square-mile tract), seeking possession of the tract and trespass damages for the period of its dispossession on the ground that the 1840 conveyance to South Carolina was null and void because the United States never consented to it as required by the Nonintercourse Act to make it effective. The District Court granted summary judgment for petitioners, in part on the ground that the Tribe's claim was barred by the South Carolina statute of limitations. The Court of Appeals reversed, holding that, under its interpretation of the Catawba Act, the state statute of limitations did not apply.

Held: The explicit redefinition of the relationship between the Federal Government and respondent Tribe reflected in the Catawba Act's clear language requires the application of the state statute of limitations to

Syllabus

the Tribe's claim. But whether that statute bars the claim should be determined by the Court of Appeals on remand. Pp. 8–13.

740 F. 2d 305, reversed and remanded.

Stevens, J., delivered the opinion of the Court, in which **Burger**, C. J., and **Brennan**, **White**, **Powell**, and **Rehnquist**, JJ., joined. **Blackmun**, J., filed a dissenting opinion, in which **Marshall** and **O'Connor**, JJ., joined.

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D. C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

No. 84-782

SOUTH CAROLINA ET AL., PETITIONERS *v.* CATAWBA INDIAN TRIBE OF SOUTH CAROLINA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

[June 2, 1986]

JUSTICE STEVENS delivered the opinion of the Court.

At issue in this litigation is the right to possession of a "Tract of Land of Fifteen Miles square" described in a 1763 treaty between the King of England and the Catawba Head Men and Warriors.[1] The tract, comprising 144,000 acres and 225 square miles, is located near the northern border of South Carolina; some 27,000 persons now claim title to different parcels within the tract. The specific question presented to us is whether the State's statute of limitations applies to the Tribe's claim. The answer depends on an interpretation of a statute enacted by Congress in 1959 to authorize a division of Catawba tribal assets. See 25 U. S. C. §§931-938. We hold that the State's statute applies, but we do not reach the question whether it bars the Tribe's claim.

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[1] The 1763 Treaty of Fort Augusta was entered into by the Catawbas and British and colonial officials, and provides, in relevant part:

"And We the Catawba Head Men and Warriors in Confirmation of an Agreement heretofore entered into with the White People declare that we will remain satisfied with the Tract of Land of Fifteen Miles square a Survey of which by our consent and at our request has been already begun and the respective Governors and Superintendant on their Parts promise and engage that the aforesaid survey shall be compleated and that the Catawbas shall not in any respect be molested by any of the King's subjects within the said Lines but shall be indulged in the usual Manner of hunting Elsewhere." XI Colonial Records of North Carolina 201-202 (1763), reprinted in App., 35.

Simply stated, the Tribe[2] claims that it had undisputed ownership and possession of the land before the first Nonintercourse Act was passed by Congress in 1790;[3] that the Nonintercourse Act prohibited any conveyance of tribal land without the consent of the United States; and that the United States never gave its consent to a conveyance of this land. Accordingly, the Tribe's purported conveyance to South Carolina in 1840 is null and void. Among the defenses asserted by petitioners[4] is the contention that, even if the Tribe's claim was valid before passage and enactment of the Catawba Division of Assets Act, §5 of the Act made the state statute of limitations applicable to the claim. Because that is the only contention that we review, it is not necessary to describe much of the historical material in the record.

I

In 1760 and 1763, the Tribe surrendered to Great Britain its aboriginal territory in what is now North and South Carolina in return for the right to settle permanently on the "Tract of Land of Fifteen Miles Square" that is now at issue. For purposes of this summary judgment motion, it is not disputed that the Tribe retained title to the land when the Nonintercourse Acts were passed.

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[2] The respondent, Catawba Indian Tribe, Inc., is a nonprofit corporation organized under the laws of South Carolina in 1975. Like the District Court and the Court of Appeals, we assume that respondent is the successor in interest of the Catawba Indian Tribe of South Carolina. For convenience, we refer to the respondent as the "Tribe" throughout this opinion.

[3] See Act of July 22, 1790, ch. 33, § 4, 1 Stat. 138. The Act now codified at 25 U. S. C. § 177, states in relevant part:

"No purchase, grant, lease, or other conveyance of lands, or of any title or claim thereto, from any Indian nation or tribe of Indians, shall be of any validity in law or equity, unless the same be made by treaty or convention entered into pursuant to the Constitution."

[4] The petitioners include the State of South Carolina and approximately 76 other parties who are named as defendants in the complaint; they were sued as representatives of a class that was alleged to consist of the approximately 27,000 persons who claim an interest in the disputed land.

By 1840, the Tribe had leased most, if not all, of the land described in the 1763 treaty to white settlers. In 1840, the Tribe conveyed its interest in the "Tract of Land of Fifteen Miles Square" to the State of South Carolina by entering into the "Treaty of Nation Ford." In that treaty, the State agreed, in return for the "Tract," to spend $5,000 to acquire a new reservation, to pay the Tribe $2,500 in advance, and to make nine annual payments of $1,500 in the ensuing years. In 1842, the State purchased a 630-acre tract as a new reservation for the Tribe, which then apparently had a membership of about 450 persons.[5] This land is still held in trust for the Tribe by South Carolina.

The Tribe contends that the State did not perform its obligations under the treaty—it delayed the purchase of the new reservation for over two and a half years; it then spent only $2,000 instead of $5,000 to purchase the new land; and it was not actually "new" land because it was located within the original 144,000 acre tract. Still more importantly, as noted, the Tribe maintains that this entire transaction was void because the United States did not consent to the conveyance as required by the Nonintercourse Act.

At various times during the period between 1900 and 1943, leaders of the Tribe applied to the State for citizenship and for a "final settlement of all their claims against the State."[6] Petitioners argue that these claims merely sought full performance of the State's obligations under the 1840 treaty, but, for purposes of our decision, we accept the Tribe's position that it was then asserting a claim under the Nonintercourse Acts and thus challenging the treaty itself. In any event, both state officials and representatives of the Federal Government took an interest in the plight of the Tribe.[7]

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[5] An 1825 War Department chart indicated that the Catawbas totalled 450 persons. 2 American State Papers 545 (1925).

[6] See 1920 S. C. Acts 1700, Joint. Res. No. 904, § 1.

In response to this concern, on December 14, 1943, the Tribe, the State, and the Office of Indian Affairs of the Department of the Interior entered into a Memorandum of Understanding which was intended to provide relief for the Tribe, but which did not require the Tribe to release its claims against the State.[8] Pursuant to that agreement, the State purchased 3,434 acres of land at a cost of $70,000 and conveyed it to the United States to be held in trust for the Tribe.[9] The Federal Government agreed to make annual contributions of available sums for the welfare of the Tribe and to assist the Tribe with education, medical benefits, and economic development. For its part, the Tribe agreed to conduct its affairs on the basis of the Federal Government's recommendations; it thereafter adopted a constitution approved by the Secretary of the Interior pursuant to the Indian Reorganization Act, 25 U. S. C. § 476.

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[7] In 1930, a Subcommittee of the Senate Committee on Indian Affairs held hearings in Rock Hill, South Carolina, which is located in the 144,000 acre tract. Senator Thomas of Oklahoma wrote that the "subcommittee . . . found some hundred and seventy-five remnants of this band located on a tract of practically barren rock and gradually starving to death." Division of Tribal Assets of Catawba Indian Tribe, Hearings on H. R. 6128, before the Subcommittee on Indian Affairs of the House Committee on Interior and Insular Affairs, 86th Cong., 1st Sess. (unpublished), Insert 5, at 3 (Minutes of State and Federal Conference, Oct. 21, 1958) (Record, Vol. VI, Ex. 56), quoting Feb. 10, 1932 letter, Senator Thomas to Commissioner Rhoads.

[8] Preliminary drafts of the Memorandum of Understanding contained a provision extinguishing the Tribe's reservation claim (Record, Vol. VI, Ex. 49), but that provision was deleted. The Solicitor of the Department of the Interior emphasized that the agreement should not use "a contract under the Johnson-O'Malley Act in order to deprive the Indian tribe of claims which it might be able to enforce in the courts." United States Department of the Interior, Office of the Solicitor, Memorandum for the Commissioner of Indian Affairs. *Id.*, Ex. 50, p. 3.

[9] The State also agreed to appropriate at least $9,500 annually for three years for the benefit of the Tribe and to extend to Catawbas the rights and privileges of all citizens, including admission to public schools. *Ibid.*

In 1953, Congress decided to make a basic change in its policies concerning Indian affairs. The passage of House Concurrent Resolution 108 on August 1, 1953[10] marked the beginning of the "termination era"—a period that continued into the mid-1960s, in which the Federal Government endeavored to terminate its supervisory responsibilities for Indian tribes.[11] Pursuant to that policy, the Federal Government identified the Catawba Tribe as a likely candidate for the withdrawal of federal services.[12] Moreover, members of the

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[10] That Resolution declared, "it is the policy of Congress, as rapidly as possible, to make the Indians within the territorial limits of the United States subject to the same laws and entitled to the same privileges and responsibilities as are applicable to other citizens of the United States, to end their status as wards of the United States, and to grant them all of the rights and prerogatives pertaining to American citizenship." H. R. Con. Res. 108, 83d Cong., 1st Sess. (1953), 67 Stat. B132.

[11] According to one compilation, between 1954 and 1962, Congress passed 12 separate "Termination Acts," the 11th of which was the Catawba Act. See F. Prucha, The Great Father 1048 (1984). The termination policy has been criticized by various commentators. See, *e. g.*, Cornell, The New Indian Politics, 10 Wilson Q. 113, 121 (1986); F. Prucha, *supra*, 1046–1059 (1984); Wilkinson & Biggs, The Evolution of the Termination Policy, 5 American Indian L. Rev. 139 (1977); Preloznik & Felsenthal, The Menominee Struggle to Maintain Their Tribal Assets and Protect Their Treaty Rights Following Termination, 51 N. D. L. Rev. 53 (1975). The ultimate legislative wisdom of the termination policy is, of course, not before the Court.

[12] In September 1954, a House Study Subcommittee on Indian Affairs reported that the Catawba Tribe was one of the groups able to take responsibility for their affairs and therefore was ready for termination of federal services. H. R. Rep. No. 2680, 83d Cong., 2d Sess., 2–3 (1954). In contrast to the report made by Senator Thomas in 1930, n. 7, *supra*, the reports accompanying the Act concluded that the Catawbas had been able to merge into the general community and had been able to attain an economic position comparable to that of non-Indians. See S. Rep. No. 863, 86th Cong., 1st Sess., 3 (1959) ("The Catawba Indians have advanced economically . . . during the past 14 years, and have now reached a position that is comparable to their non-Indian neighbors"); H. R. Rep. No. 910, 86th

Tribe desired an end to federal restrictions on alienation of their lands in order to facilitate financing for homes and farm operations.[13] Accordingly, after discussions with representatives of the Bureau of Indian Affairs in which leaders of the Tribe were assured that any claim they had against the State would not be jeopardized by legislation terminating federal services, the Tribe adopted a resolution supporting such legislation and authorizing a distribution of tribal assets to the members of the Tribe.[14] After receiving advice that the Tribe supported legislation authorizing the disposal of the tribal assets and terminating federal responsibility for the Tribe and its individual members, Congress enacted the Catawba Indian Tribe Division of Assets Act, 73 Stat. 592, 25 U. S. C. §§ 931–938. The Act provides for the preparation of a tribal membership roll, § 931; the tribal council's designation of sites for church, park, playground, and cemetery purposes, § 933(b); and the division of remaining assets among the enrolled members of the Tribe, § 933(f). The Act also provides for the revocation of the Tribe's Constitution and the termination of federal services for the Tribe, § 935. It explicitly states that state laws shall apply to members of the Tribe in the same manner that they apply to non-Indians. *Ibid.* Pursuant to that Act, the 3,434-acre reservation that had been acquired as a result of the 1943 Memorandum of Understanding was distributed to the members of the Tribe; the Secretary of the Interior revoked the Tribe's Constitution, effective July 1, 1962.

Cong., 1st Sess., 2 (1959) (same). Most adult male Catawbas were employed at the time: 47% were in industry, 20% in skilled labor, 7% in the armed services, 15% in odd jobs, 5% retired, and 6% on the welfare rolls. S. Rep., at 4; H. R. Rep., at 5.

[13] See 105 Cong. Rec. 5462 (1959) (statement of Rep. Hemphill), App. 102.

[14] The resolution adopted at the meeting of the Tribe on January 3, 1959, expressly noted that "nothing in this legislation shall affect the status of any claim against the State of South Carolina by the Catawba Tribe." *Id.*, at 103.

In 1980, the Tribe commenced this action seeking possession of the 225-square-mile tract and trespass damages for the period of its dispossession. All of the District Judges for the District of South Carolina recused themselves, and Judge Willson of the Western District of Pennsylvania was designated to try the case. After the development of a substantial record of uncontested facts, Judge Willson granted the petitioners' motion for summary judgment. His order of dismissal was initially reversed by a panel of the Court of Appeals for the Fourth Circuit, 718 F. 2d 1291 (1983); sitting en banc, the full Court of Appeals adopted the panel's opinion. 740 F. 2d 305 (1984). Because of the importance of the case, we requested the views of the Solicitor General of the United States and granted certiorari, 471 U. S. —— (1985). We now reverse.

II

Section 5 of the Catawba Act is central to this dispute. As currently codified, it provides:

> "The constitution of the tribe adopted pursuant to sections 461, 462, 463, 464, 465, 466 to 470, 471 to 473, 474, 475, 476 to 478, and 479 of this title shall be revoked by the Secretary. Thereafter, the tribe and its members shall not be entitled to any of the special services performed by the United States for Indians because of their status as Indians, all statutes of the United States that affect Indians because of their status as Indians shall be inapplicable to them, and the laws of the several States shall apply to them in the same manner they apply to other persons or citizens within their jurisdiction. Nothing in this subchapter, however, shall affect the status of such persons as citizens of the United States." 25 U. S. C. §935.

This provision establishes two principles in unmistakably clear language. First, the special federal services and statutory protections for Indians are no longer applicable to the

Catawaba Tribe and its members. Second, state laws apply to the Catawba Tribe and its members in precisely the same fashion that they apply to others.

The Court of Appeals disagreed with this reading of the Act. For it concluded that the word "them" in the second sentence of § 5 could refer to the individual Indians who are members of the Tribe and not encompass the Tribe itself. Relying on the canon that doubtful expressions of legislative intent must be resolved in favor of the Indians,[15] it thus held that the language in § 5 about the inapplicability of federal Indian statutes and the applicability of state laws did not reach the Tribe itself.

The canon of construction regarding the resolution of ambiguities in favor of Indians, however, does not permit reliance on ambiguities that do not exist; nor does it permit disregard of the clearly expressed intent of Congress.[16] It seems clear to us that the antecedent of the words "them" and "their" in the second sentence of § 5 is the compound subject of the first clause in the sentence, namely, "the tribe and its members." To read the provision otherwise is to give it a contorted construction that abruptly divorces the first clause from the second and the third, and that conflicts with the central purpose and philosophy of the termination Act. According the statutory language its ordinary meaning, moreover, is reinforced by the fact that the first sentence in the section provides for a revocation of the Tribe's constitution. It would be most incongruous to preserve special protections for a tribe whose constitution has been revoked while withdrawing protection for individual members of that tribe.[17]

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[15] *DeCoteau* v. *District County Court*, 420 U. S. 425, 444 (1975); *Antoine* v. *Washington*, 420 U. S. 194, 199–200 (1975); *Mattz* v. *Arnett*, 412 U. S. 481, 504–505 (1973).

[16] See *Oregon Dept. of Fish and Wildlife* v. *Klamath*, 473 U. S. ——, —— (1985) (slip op. 21) ("even though 'legal ambiguities are resolved to the benefit of the Indians,' *DeCoteau* v. *District County Court*, 420 U. S. 425, 447 (1975), courts cannot ignore plain language that, viewed in historical context and given a 'fair appraisal,' *Washington* v. *Washington Commercial Passenger Fishing Vessel Assn.*, 443 U. S. [658, 673 (1979)], clearly runs counter to a tribe's later claims"); *Rice* v. *Rehner*, 463 U. S. 713, 732 (1983) (canon of construction regarding certain Indian claims should not be applied "when application would be tantamount to a formalistic disregard of congressional intent"); *Andrus* v. *Glover Construction Co.*, 446 U. S. 608, 618–619 (1980); *DeCoteau* v. *District County*, 420 U. S., at 447 ("A canon of construction is not a license to disregard clear expressions of tribal and congressional intent").

Without special federal protection for the Tribe, the state statute of limitations should apply to its claim in this case. For it is well established that federal claims are subject to state statutes of limitations unless there is a federal statute of limitations or a conflict with federal policy.[18] Although federal policy may preclude the ordinary applicability of a state statute of limitations for this type of action in the absence of a specific congressional enactment to the contrary, *County of Oneida* v. *Oneida Indian Nation*, 470 U. S. —— (1985), the Catawba Act clearly suffices to re-establish the usual principle regarding the applicability of the state statute of limitations. In striking contrast to the situation in

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[17] Respondent argues that the scope of the Act was merely to terminate the specific federal services arising from the 1943 Memorandum of Understanding. Such a limited interpretation cannot be reconciled with the broader language of the Act ("the tribe and its members shall not be entitled to *any* of the special services performed by the United States for Indians because of their status as Indians"; "*all* statutes of the United States that affect Indians because of their status as Indians shall be inapplicable to them"; "the laws of the several states shall apply to them *in the same manner* they apply to other persons or citizens within their jurisdiction") (emphasis added).

[18] See, *e. g.*, *Wilson* v. *Garcia*, 471 U.S ——, —— (1985) (slip op. 5); *Board of Regents* v. *Tomanio*, 446 U. S. 478, 483–484 (1980); *Johnson* v. *Railway Express Agency, Inc.*, 421 U. S. 454, 462 (1975); *Auto Workers* v. *Hoosier Cardinal Corp.*, 383 U. S. 696, 703–704 (1966); *Cope* v. *Anderson*, 331 U. S. 461, 463 (1947); *Rawlings* v. *Ray*, 312 U. S. 96, 97 (1941); *O'Sullivan* v. *Felix*, 233 U. S. 318, 322–323 (1914); *Chattanooga Foundry & Pipe Works* v. *Atlanta*, 203 U. S. 390, 397–398 (1906); *McClaine* v. *Rankin*, 197 U. S. 154, 158 (1905); *Campbell* v. *Haverhill*, 155 U. S. 610, 617 (1895); *M'Cluny* v. *Silliman*, 3 Pet. U. S. 270, 277 (1830).

County of Oneida, the Catawba Act represents an explicit redefinition of the relationship between the Federal Government and the Catawbas; an intentional termination of the special federal protection for the Tribe and its members; and a plain statement that state law applies to the Catawbas as to all "other persons or citizens."

That the state statute of limitations applies as a consequence of terminating special federal protections is also supported by the significance we have accorded congressional action redefining the federal relationship with particular Indians. We have long recognized that, when Congress removes restraints on alienation by Indians, state laws are fully applicable to subsequent claims.[19] Similarly, we have emphasized that termination acts subject members of the terminated Tribe to "the full sweep of state laws and state taxation."[20] These principles reflect an understanding that congressional action to remove restraints on alienation and other federal protections represents a fundamental change in federal policy with respect to the Indians who are the subject of the particular legislation.

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[19] See, *e. g. Larkin* v. *Paugh*, 276 U. S. 431, 439 (1928) ("With the issue of the patent, the title not only passed from the United States but the prior trust and the incidental restrictions against alienation were terminated. This put an end to the authority theretofore possessed by the Secretary of the Interior by reason of the trust and restriction—so that thereafter all questions pertaining to the title were subject to examination and determination by the courts, appropriately those in Nebraska, the land being there"); *Dickson* v. *Luck Land Co.*, 242 U. S. 371, 375 (1917) ("With those restrictions [of Congress] entirely removed and the fee simple issued it would seem that the situation was one in which all questions pertaining to the disposal of the lands naturally would fall within the scope and operation of the laws of the State"); *United States* v. *Waller*, 243 U. S. 452, 461–462 (1917) ("We cannot escape the conviction that the plain language of this act evidences the intent and purpose of Congress to make such lands allotted to mixed-blood Indians subject to alienation with all the incidents and rights which inhere in full ownership in persons of full capacity"); *Schrimpscher* v. *Stockton*, 183 U. S. 290, 296 (1902) (after a treaty removed restraints from alientation of land by certain Wyandotte Indians, state statute of limitations ran against Indians, even though Indians later asserted claim of a prior federal treaty violation; after removal of restraints on alienation, the Indian's heirs "were chargeable with the same diligence in beginning an action for their recovery as other persons having title to lands").

The Court of Appeals found support for its conclusion about the nonapplicability of the state statute of limitations in § 6 of the Catawba Act, which provides that nothing in the statute affects the rights of the Tribe under the laws of South Carolina.[21] The thrust of the Court of Appeals' reasoning was that, if a state law was inapplicable to the Tribe or its members before the effective date of the Act, its application after the effective date necessarily violates § 6. But such a reading contradicts the plain meaning of § 5's reference to the applicability of state laws. In our view § 6 was merely intended to remove federal obstacles to the ordinary application of state law. Section 6 cannot be read to preserve, of its own force, a federal tribal immunity from otherwise applicable state law without defeating a basic purpose of the Act and negating explicit language in § 5.[22] Most fundamentally, § 6 simply does not speak to the explicit redefinition of the federal relationship with the Catawbas that is the basis for the applicability of the state statute of limitations.

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[20] *Bryan* v. *Itasca County*, 426 U. S. 373, 389 (1976). See also *United States* v. *Antelope*, 430 U. S. 641, 647, n. 7 (1977) ("members of tribes whose official status has been terminated by congressional enactment are no longer subject, by virtue of their status, to federal criminal jurisdiction under the Major Crimes Act"); *Affiliated Ute Citizens* v. *United States*, 406 U. S. 128 (1972) (terminated members of Tribe must bring action to invalidate allegedly fraudulent conveyance under same laws as other citizens).

As the Court of Appeals noted, in *Menominee Tribe* v. *United States*, 391 U. S. 404 (1968), the Court concluded that the Menominee Termination Act did not terminate the Tribe's hunting and fishing rights. The Court emphasized that the Termination Act must be read *in pari materia* with an Act passed in the same Congress that preserved hunting and fishing rights. *Id.*, at 411. In this case, of course, there is no similar contemporaneous statute. Moreover, in *Menominee*, the Court was concerned about a "backhanded" abrogation of treaty rights, *id.*, at 412; no comparable abrogation is at issue here.

[21] As currently codified, § 6 provides:

"Nothing in this subchapter shall affect the rights, privileges, or obligations of the tribe and its members under the laws of South Carolina." 25 U. S. C. § 936.

Finally, the Court of Appeals relied heavily on the assurance to the Tribe that the status of any claim against South Carolina would not be affected by the legislation.[23] Even assuming that the legislative provisions are sufficiently ambiguous to warrant reliance on the legislative history, we believe that the Court of Appeals misconceived the import of this assurance. We do not accept petitioners' argument that the Catawba Act immediately extinguished any claim that the Tribe had before the statute became effective. Rather, we assume that the status of the claim remained exactly the same immediately before and immediately after the effective date of the Act, but that the Tribe thereafter had an obligation to proceed to assert its claim in a timely manner as would any other person or citizen within the State's jurisdiction. As a result, unlike the Court of Appeals, we perceive no contradiction between the applicability of the state statute of limitations and the assurance that the status of any state claims would not be affected by the Act.

We thus conclude that the explicit redefinition of the federal relationship reflected in the clear language of the Catawba Act requires the application of the state statute of limitations to the Tribe's claim.

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[22] It is an "elementary canon of construction that a statute should be interpreted so as not to render one part inoperative." *Colautti* v. *Franklin*, 439 U. S. 379, 392 (1979). See also *Mountain States Tel. & Tel. Co.* v. *Pueblo*, 472 U. S. ——, —— (1985) (slip op. 11); *United States* v. *Menasche*, 348 U. S. 528, 538–539 (1955) ("It is our duty 'to give effect, if possible, to every clause and word of a statute,' *Montclair* v. *Russell*, 107 U. S. 147, 152, rather than to emasculate an entire section").

[23] See 718 F. 2d 1291, 1296 (1983) (quoting Bureau of Indian Affairs official's assurance " 'that any claim the Catawbas had against the State would not be jeopardized by carrying out a program with the Federal Government' ").

III

The District Court held that respondent's claim is barred by the South Carolina statute of limitations. The Court of Appeals' construction of the 1959 federal statute made it unnecessary for that court to review the District Court's interpretation of state law. Because the Court of Appeals is in a better position to evaluate such an issue of state law than we are,[24] we remand the case to that court for consideration of this issue.

It is so ordered.

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[24] See *Pembaur* v. *Cincinnati*, 475 U. S. ——, ——, n. 13 (1986); *Regents of University of Michigan* v. *Ewing*, 474 U. S. ——, ——, n. 10 (1985); *Bishop* v. *Wood*, 426 U. S. 341, 345–347 (1976); *Propper* v. *Clark*, 337 U. S. 472, 486–487 (1949).

SUPREME COURT OF THE UNITED STATES

No. 84-782

SOUTH CAROLINA, ET AL., PETITIONERS *v.*
CATAWBA INDIAN TRIBE OF
SOUTH CAROLINA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE FOURTH CIRCUIT

[June 2, 1986]

JUSTICE BLACKMUN, with whom JUSTICE MARSHALL and JUSTICE O'CONNOR join, dissenting.

The Catawba Indian Tribe Division of Assets Act, 73 Stat. 592, 25 U. S. C. § 931 *et seq.*, was passed by Congress in 1959 to divide up the Tribe's federally supervised reservation so that individual Catawbas could sell or mortgage their allotments. The Court today concludes that the Act also had the incidental effect of applying a South Carolina statute of limitations to the Catawbas' pre-existing and longstanding claim to lands the State purported to purchase from the Tribe in 1840. I feel this interpretation cannot be reconciled with the language of the Act under this Court's traditional approach to statutes regulating Indian affairs. I therefore dissent.

I

Too often we neglect the past. Even more than other domains of law, "the intricacies and peculiarities of Indian law . . . deman[d] an appreciation of history." Frankfurter, Foreword to A Jurisprudential Symposium in Memory of Felix S. Cohen, 9 Rutgers L. Rev. 355, 356 (1954).

Before the arrival of white settlers, the Catawba Indians occupied much of what is now North and South Carolina. In the 1760 Treaty of Pine Tree Hill, the Catawbas relinquished the bulk of their aboriginal territory to Great Britain in exchange for assurances that they would be allowed to live in peace on a small portion of that territory, a square of land 15 miles on each side (144,000 acres), which today surrounds and includes Rock Hill, S. C. Three years later, in the Treaty of Augusta, the Tribe again agreed to "remain satisfied with the Tract of Land of Fifteen Miles square," and the British once more promised that "the Catawba shall not in any respect be molested by any of the King's subjects within the said Lines." App. 35. It is the 144,000 acres reserved for the Catawbas in 1760 and again in 1763—"a mere token of the[ir] once large domain"—that give rise to this litigation. See J. Brown, The Catawba Indians 8 (1966) (Brown).

The historical record suggests that the Catawbas were driven to the agreements of 1760 and 1763 in large part by the colonists' repeated and continuing encroachments on tribal lands.[1] Some of the land was acquired by purchase, see, *e. g.*, *id.*, at 165, but in South Carolina, as elsewhere, "[f]rom the very beginning abuses marred the transfer of land titles from the Indians to individuals among the English colonists." F. Prucha, American Indian Policy in the Formative Years 6 (1962). Indeed, the South Carolina Provincial Council took legislative notice in a 1739 statute that lands purchased from Indians were "generally obtained . . . by unfair representations, fraud and circumvention, or by making them gifts or presents of little value, by which practices, great resentments and animosities have been created amongst the Indians toward the inhabitants of this Province." An Act to restrain and prevent the purchasing Lands from Indians, 1 The First Laws of the State of South Carolina 160–161 (J. Cushing ed. 1981). The 1739 statute therefore barred the private acquisition of Indian lands without a grant or license from the Crown or the Governor, but such steps apparently did little to stop white encroachments on Indian territory. See Clinton & Hotopp, Judicial Enforcement of the Federal Restraints on Alienation of Indian Land: The Origins of the Eastern Land Claims, 31 Maine L. Rev. 17, 21 (1979). Recognizing that "great frauds and abuses have been committed in the purchasing lands of the Indians," the Crown in October 1763—shortly before the signing of the Treaty of Augusta—flatly forbade any further private purchases of land reserved for Indian tribes. Proclamation of 1763, reprinted in 3 W. Washburn, The American Indian and the United States 2135, 2138 (1973).

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[1] In letters written in 1754 to the Catawbas and to the President of the Council of North Carolina, Governor Glen of South Carolina noted that the Catawbas repeatedly had complained about whites' settling too close to them. 6 Record, Exs. 1 and 2. In response to these complaints, Governor Glen forbade whites from settling within 30 miles of Catawba towns, *ibid.*, but that prohibition was frequently ignored. See C. Hudson, The Catawba Nation 49 (1970). For general discussions of early colonial encroachments on Catawba land, see Brown, at 163–166; P. Dammann, D. Miller, & D. Israel, A History of the Catawba Tribe and its Reservation Lands, reprinted in Settlement of the Catawba Indian Land Claims, Hearing before the House Committee on Interior and Insular Affairs on H. R. 3274, 96th Cong., 1st Sess., 135, 151–153 (1979) (Hearing).

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The United States from an early date followed a similar policy. Since 1790, the Nonintercourse Act, now codified as reenacted and amended at 25 U. S. C. § 177, has broadly prohibited the sale of Indian land without the consent of the Federal Government. Despite this prohibition—which in 1793 was extended to include not only outright purchases but also acquisitions of any "claim" to protected lands, see Act of Mar. 1, 1793, § 8, 1 Stat. 330—mounting pressures from settlers in the early 19th century led the State of South Carolina to enact a series of statutes purporting to authorize the leasing of Catawba lands to non-Indians. Initially, the leases signed under these statutes seem to have posed little threat to the Tribe. According to B. S. Massey, who knew the Catawbas during this time and later served as South Carolina's agent to the Tribe, "[t]hey were then strong and felt themselves in their own greatness, governed by their own laws, working the best spots of land and leasing out the poorer portions to the white men." Report to The Governor of South Carolina on the Catawba Indians 4 (1854), reprinted in 6 Record, Ex. 11.

By the 1830's, however, nearly all of the 144,000 acres reserved for the Tribe in the Treaty of Augusta had been leased to non-Indians. This situation proved disastrous, because rents were "generally paid in old horses, old cows or bed quilts and clothes, at prices that the whites set on the articles taken." *Ibid.* The Catawbas soon were reduced to "a state of starvation and distress," *ibid.*, and they ultimately gave in to repeated efforts by the State to purchase their land. In 1840, representatives of the Tribe and the State signed the Treaty of Nation Ford. Under this "treaty"—which the United States never joined or approved—the Catawbas relinquished all their land in exchange for two promises. First, the State promised the sum of $16,000 in a series of resettlement payments. Second, the State pledged that it would purchase a new reservation "of the value of five thousand dollars," including 300 acres of "good arable lands fit for cultivation" in a thinly populated area of North or South Carolina satisfactory to the Indians. App. 38–39.[2]

The South Carolina Legislature promptly provided for the transfer of title from the State to the lessees of the 144,000 acres, requiring only that the lessees reimburse the State proportionately for its advances to the Tribe. Act of Dec. 18, 1840, §3, 7 S. C. Stats. 103 (1840). Unfortunately, the

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[2] According to Massey, the Indians "were driven to" this agreement "by being surrounded by white men, [who] cheat[ed] them out of their rights, and [by] partaking of the vices of the whites but few of their virtues." Report to The Governor of South Carolina on the Catawba Indians 5 (1854), reprinted in 6 Record, Ex. 11. The "vices" to which Massey referred may have included the consumption of alcohol; the Catawbas later charged that State representatives negotiated the treaty by setting out a whiskey barrel and tin cups and inviting the Indians to help themselves. This charge was reported to the Department of Interior in a 1908 memorandum by Catawba tribal attorney Chester Howe. See Plaintiffs' Response to Defendants' Motion to Dismiss 23, n. 30, citing Record Group 75, National Archives Central Files 1907–1939, BIA File No. 1753–1906.

State showed less enthusiasm in fulfilling its contractual obligations to the Indians. After allowing the Catawbas to wander homeless and uncompensated for 2½ years, the State reportedly spent $2,000 to buy back 630 agriculturally undesirable acres of the Catawbas' original 18th century treaty lands as a "new" reservation for the Tribe.[3] The State continues to hold these 630 acres for the Catawbas. It is unclear from the record before us whether the Tribe ever received the resettlement payments promised by the State.

In the 146 years that have passed since the Nation Ford agreement, the Catawbas repeatedly have pressed their claim to the 144,000 acres, which they feel were taken from them illegally. In the early 1900's, the Tribe petitioned both the Federal Government and the State of South Carolina for relief, arguing that the 1840 transfer was void because the United States had not approved it. The Commissioner of Indian Affairs advised the Catawbas in 1906 and again in 1909 that the Department of the Interior would not seek relief on their behalf. He explained that the Catawbas were "state Indians" for whom the United States had no responsibility, and, consequently, that the absence of federal participation in the Treaty of Nation Ford did not void the transaction.[4] In 1908, the South Carolina Attorney General reached the same conclusion, and advised the State Legislature that the Tribe had no outstanding claim to any of the 144,000 acres. 1908 Op. S. C. Atty. Gen. 17, 18, 29–32. The Tribe nonetheless continued to press its claim to the land. A federal Indian agent visiting the Catawbas in December 1910, for example, was asked about the Tribe's prospects for recovering "their old reservation of 15 miles square"; he told them the Department of the Interior would not take their case into court. 6 Record, Ex. 21, pp. 11–12 (letter from C. Davis to Comm'r of Indian Affairs, Jan. 5, 1911).

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[3] See Brown, at 317, 320–322. Assuming this account is correct, the new reservation was less than one half of one percent of the Tribe's 1763 treaty lands. The price paid by the State for the new reservation—which works out to roughly $3.17 per acre—contrasts strikingly with the price paid for the same land when purchased from the Indians 2½ years earlier—the approximate equivalent of 15 cents per acre payable in installments over 10 years.

[4] 6 Record, Exs. 18, 20. But see *United States* v. *Candelaria*, 271 U. S. 432, 442 (1926) (construing the term "Indian Tribe" in the Nonintercourse Act to refer to any " 'body of Indians of the same or a similar race, united in a community under one leadership or government, and inhabiting a particular though sometimes ill-defined territory,' " quoting *Montoya* v. *United States*, 180 U. S. 261, 266 (1901); *Joint Tribal Council of the Passamaquoddy Tribe* v. *Morton*, 528 F. 2d 370, 376–378 (CA1 1975) (applying Nonintercourse Act to Tribe lacking federal recognition).

The seeds of the legislation found dispositive by the Court today were planted in 1943, when the Tribe, the State of South Carolina, and the Department of the Interior concluded a Memorandum of Understanding providing for a new reservation for the Catawbas, and placing the Tribe and the new reservation under federal supervision. Evidently concerned about the Tribe's continued grievances concerning the 1840 agreement, South Carolina sought, unsuccessfully, to include in the Memorandum a waiver of any outstanding claims the Catawbas had against the State. *Id.*, Ex. 48 (letter from Ass't Comm'r of Indian Affairs to S. C. State Auditor, Aug. 28, 1941). Preliminary drafts of the Memorandum included such a waiver, see *id.*, Ex. 49, p. 5, but federal officials ultimately dropped the provision because they doubted the legality of using the agreement to deprive the Indians of claims that otherwise might be enforceable in court, see App. 43–44 (memorandum from Interior Dept. Solicitor to Comm'r of Indian Affairs, Jan. 13, 1942).

In 1958, after representatives from the Bureau of Indian Affairs suggested to the Catawbas that their financial difficulties could be alleviated by distributing the Tribe's federally supervised assets and ending federal restrictions on alienation, the Indians expressed concern about their claims against the State, but they were assured that the proposal would not jeopardize those claims. 6 Record, Ex. 53, pp. 7–8 (memorandum from program officer to Tribal Programs Branch Chief, Jan. 30, 1959) (quoted by the Court, *ante*, at 12, n. 23). The Tribe then adopted a resolution calling on its Congressman, Representative Robert Hemphill, to introduce and secure passage of legislation to remove restraints on alienation and to distribute tribal assets; the resolution specifically requested, however, that "nothing in this legislation shall affect the status of any claim against the State of South Carolina by the Catawba Tribe." App. 103.

Representative Hemphill asked the Bureau of Indian Affairs to draft legislation "to accomplish the desires set forth in the Resolution." *Id.*, at 50. He then presented the draft bill to the Catawbas and told them that it had been "drawn up to carry out the intent of the resolution." *Id.*, at 111. After a majority of the Tribe expressed approval, Representative Hemphill introduced the bill in Congress, explaining that the Tribe had given its consent. See 105 Cong. Rec. 5462 (1959). The result was the 1959 Division of Assets Act, which the Court today concludes may bar the Tribe from pursuing its claim to the lands reserved for it in 1760 and 1763.

In the 1970's, spurred by favorable legal rulings elsewhere in the country, Catawba leaders renewed their request to the Department of Interior to seek relief for the Tribe. In 1977, the Solicitor of the Department concluded that the rebuffs given the Catawbas in 1906 and 1909 had been legally unjustified, and that the Tribe could establish a prima facie claim to the 144,000 acres. He further concluded that the Division of Assets Act operated prospectively only, and did not affect pre-existing rights. Accordingly, the Solicitor formally requested the Department of Justice to institute legal action on behalf of the Catawbas and to support the settlement discussions that the Tribe already had initiated with South Carolina officials. See Brief in Opposition 3a. The litigation request was later withdrawn in an effort to emphasize that the Interior Department favored a negotiated settlement if at all possible, and settlement legislation backed by the Tribe was introduced in Congress. See Settlement of the Catawba Indian Land Claims, Hearing before the House Committee on Interior and Insular Affairs on H. R. 3274, 96th Cong., 1st Sess., 15–17 (1979) (Hearing) (statement of Leo M. Krulitz, Solicitor of the Department of the Interior). The legislative efforts apparently proved fruitless, and in October 1980 the Tribe filed this suit.

II

The Tribe's complaint asserts a right to possession of the reserved portion of its aboriginal territory under the Nonintercourse Act, the Federal Constitution, and the treaties of 1760 and 1763.[5] These are federal claims, see *Oneida Indian Nation* v. *County of Oneida*, 414 U. S. 661, 666–678 (1974) *(Oneida I)*, and the statute of limitations is thus a matter of federal law, see *County of Oneida* v. *Oneida Indian Nation*, —— U. S. ——, —— (1985) *(Oneida II)* (slip op. 12–16). Where, as here, Congress has not specified a statute of limitations, federal courts generally borrow the most closely analogous limitations period under state law, but *only* if application of the state limitations period would not frustrate federal policy. See, *e. g.*, *Wilson* v. *Garcia*, —— U. S. ——, —— (1985) (slip op. 5); *DelCostello* v. *Teamsters*, 462 U. S. 151, 158–163 (1983); *Occidental Life Ins. Co.* v. *EEOC*, 432 U. S. 355, 367 (1977).

In *Oneida II*, the Court recognized that application of state statutes of limitations to Indian land claims generally *would* violate federal policy. The Court noted that a 1950 federal statute giving New York courts jurisdiction over most civil disputes involving Indians had been carefully crafted to exempt pre-existing land claims from the operation of a New York statute of limitations. See Act of Sept. 13, 1950, 64 Stat. 845, 25 U. S. C. §233. Furthermore, in a later series of more general enactments imposing a federal statute of limitations on certain tort and contract actions brought anywhere in the United States by Indians or by the United States on behalf of Indians, Congress specifically excluded from the limitations period all actions "to establish the title to, or right of possession of, real or personal property." 28 U. S. C. §2415.[6] The Court in *Oneida II* concluded that the text and legislative history of these statutes evinced a congressional belief that actions brought to enforce Indian property rights were not, and should not be, subject to filing deadlines other than those provided by federal statute. Borrowing a state statute of limitations in such a case "would be a violation of Congress' will." —— U. S., at —— (slip op. 16).

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[5] Although the complaint asks in part that the Tribe "be restored to immediate possession" of virtually the entire 144,000 acres, App. 25, the available remedies, even if the Tribe prevailed, well might be limited by equitable considerations. See *Yankton Sioux Tribe* v. *United States*, 272 U. S. 351, 357 (1926). The question currently before the Court, of course, is not whether part or all of the land claimed by the Catawbas should be given back to them, but whether the Tribe's ability to seek any judicial relief at all is governed by South Carolina's statute of limitations.

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[6] The federal statute of limitations for certain tort and contract actions brought by the United States on behalf of Indian Tribes was first adopted in 1966; the limitations period was not applied to suits brought by Indians themselves until 1982. "In 1972 and again in 1977, 1980, and 1982, as the statute of limitations was about to expire for pre-1966 claims, Congress extended the time within which the United States could bring suits on behalf of the Indians." *Oneida II*, —— U. S., at —— (slip op. 14). The debates over these amendments to §2415 indicate that Congress extended the filing deadline in part to allow additional time for preparation and negotiation of tort claims for trespass damages arising from allegedly illegal expropriations of tribal lands—including the 144,000 acres claimed by the Catawbas. See, *e. g.*, 123 Cong. Rec. 22166–22167 (1977) (Rep. Cohen, discussing Catawba claim and others); *id.*, at 22168 (Rep. Walsh); *id.*, at 22170 (Rep. Hanley); 126 Cong. Rec. 5748–5749 (1980) (Rep. Holland, discussing Catawba claim); *id.*, at 5750 (Rep. Udall). Members of Congress emphasized repeatedly that Indian land claims were difficult to research, that Indians historically had lacked adequate legal assistance and administrative resources, and that the United States had not played its proper role in bringing suits on the Indians' behalf. See, *e. g.*, 123 Cong. Rec. 22170 (1977) (Rep. Collins); *id.*, at 22171 (Rep. Johnson); 126 Cong. Rec. 3289 (1980) (Sen. Cranston); *id.*, at 5745–5746 (Rep. Clausen); *id.*, at 5747 (Rep. Danielson); *id.*, at 5750 (Rep. Swift). See also 123 Cong. Rec. 22171 (1977) (Rep. Weiss) ("[A]s a result of the numerous injustices suffered by American Indians during the last 150 years—many at the hands of the American Government—it is incumbent on the United States to give these people—our country's first inhabitants—a full chance to redress their grievances."); 126 Cong. Rec. 3287 (1980) (Sen. Melcher) (failure to extend statute of limitations could lead to "mass injustices"). Similar considerations presumably motivated Congress' decision to exempt entirely all claims for title or possession from the limitations period prescribed in §2415.

In determining whether the 1959 Division of Assets Act exempts the Catawbas' claim from this general principle, analysis must begin with the firmly established rule—which the Court today implicitly reaffirms, see *ante*, at 8—that ambiguities in statutes regulating Indian affairs are to be construed in the Indians' favor. See, *e. g.*, *Oneida II*, —— U. S., at —— (slip op. 19–20); *Bryan* v. *Itasca County*, 426 U. S. 373, 392 (1976); *Northern Cheyenne Tribe* v. *Hollowbreast*, 425 U. S. 649, 655, n. 7 (1976), *DeCoteau* v. *District County Court*, 420 U. S. 425, 444 (1975); *United States* v. *Santa Fe Pacific R. Co.*, 314 U. S. 339, 353–354 (1941); *Alaska Pacific Fisheries* v. *United States*, 248 U. S. 78, 89 (1918); *Choate* v. *Trapp*, 224 U. S. 665, 675 (1912); see generally F. Cohen, Handbook of Federal Indian Law 221–225 (1982 ed.). This rule is not simply a method of breaking ties; it reflects an altogether proper reluctance by the judiciary to assume that Congress has chosen further to disadvantage a people whom our Nation long ago reduced to a state of dependency. The rule is particularly appropriate when the statute in question was passed primarily for the benefit of the Indians, as was the 1959 Division of Assets Act. Absent "clear and plain" language to the contrary, *Santa Fe Pacific*, 314 U. S., at 353, it must be assumed that Congress did not intend to belie its "avowed solicitude" for the Indians, *id.*, at 354, with a "backhanded" abrogation or limitation of their rights, *Menominee Tribe* v. *United States*, 391 U. S. 404, 412 (1968).

The Court today evidently finds in §5 of the Division of Assets Act "the clearly expressed intent of Congress," *ante*, at 8, that the Catawbas' tribal land claim was to be subject to South Carolina's statute of limitations. The Court relies largely on two provisions of § 5. The first renders inapplicable to the Catawbas all "special services performed by the United States for Indians because of their status as Indians," and "all statutes of the United States that affect Indians because of their status as Indians." The second provides that state laws shall "apply to [the Catawbas] in the same manner they apply to other persons or citizens." 25 U. S. C. § 935. Neither of these provisions, in my view, is able to bear the weight the Court places upon it.

A

The first provision merely renders federal Indian "services" and "statutes" inapplicable to the Catawbas. I agree with the Court that this provision makes the Nonintercourse Act, along with other Indian statutes, inapplicable both to individual Catawbas and to the Tribe. See *ante*, at 7–11. But that simply means that after the Division of Assets Act went into effect, the Tribe no longer was statutorily barred from selling or leasing its land. The services-and-statutes clause of the Act does not expressly abrogate or place procedural conditions on any *pre-existing* claims the Catawbas may have had, and the broad federal policy against application of state statutes of limitations to Indian land claims is neither a "service" nor a "statute."

The majority nonetheless asserts that this Court has "long recognized that, when Congress removes restraints on alienation by Indians, state laws are fully applicable to subsequent claims." *Ante*, at 10. The cases it cites for that proposition all were decided well before the emergence during the past 35 years of a clear congressional policy against the application of state statutes of limitations to Indian land claims. See *Oneida II*, —— U. S., at —— (slip op. 12–16). More importantly, all the cases cited by the majority involve lands for which patents had been issued to individual Indians, not lands alleged to remain tribal property. This Court made clear in *Oneida I* that claims arising under such patents are not federal claims at all, because, "[o]nce patent issues, the incidents of ownership are, for the most part, matters of local property law to be vindicated in local courts." 414 U. S., at 676. In this case, however, as in *Oneida I*, "the assertion of a federal controversy does not rest solely on the claim of a right to possession derived from a federal grant of title whose scope will be governed by state law. Rather, it rests on the substantial claim that federal law now protects, and has continuously protected from the time of the formation of the United States, possessory right to tribal lands, wholly apart from the application of state law principles which normally and separately protect a valid right of possession." *Id.*, at 677. Here, as in *Oneida I*, the complaint thus "asserts a present right to possession under federal law." *Id.*, at 675.

I do not see how a statute removing restraints on alienation can fairly be said to signal unambiguously a congressional intent to subject pre-existing tribal land claims arising under federal law to state statutes of limitations. But even if I agreed with the majority that the removal of restraints on alienation should trigger the application of state limitations periods, the 1959 Act lifted only *statutory* restrictions on the alienation of Catawba land, and the requirement that the Federal Government approve any transfer of the property at issue in this case did not, and does not, stem solely from any federal statute. The land set aside for the Catawbas in 1760 and 1763 was within the Tribe's aboriginal territory,[7] and their claim to the land thus derives from original title[8] as well as from the 18th century treaties.[9] With respect to original title, at least, the Nonintercourse Act merely "'put in statutory form what was or came to be the accepted rule—that the extinguishment of Indian title required the consent of the United States.'" *Oneida II*, —— U. S., at —— (slip op. 12), quoting *Oneida I*, 414 U. S., at 678.[10]

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[7] John Stuart, the King's Superintendent of Indian Affairs, who had negotiated the Treaty of Augusta, noted in a 1772 letter to the South Carolina Governor that the 144,000 acres reserved for the Catawbas in that treaty were, "as well as a very considerable Extent of Country besides[,] possessed by them when the Subjects of England first Settled in this part of the World." 6 Record, Exh. 7, p. 1.

There is nothing in the 1959 legislation that indicates that Congress intended to exempt the Catawbas from this common-law protection of undistributed tribal property as well as from its statutory codification. Nor is there anything to indicate that Congress meant to abrogate the protection promised to the Tribe under the treaties of 1760 and 1763, which the Tribe claims provide an independent source of continuing federal protection. Indeed, in rejecting an argument that a similar provision of the Menominee Termination Act destroyed treaty rights to hunt and fish, this Court noted: "The use of the word 'statutes' is potent evidence that no *treaty* was in mind." *Menominee Tribe*, 391 U. S., at 412 (emphasis in original). In the same way, Congress' use in 1959 of the terms "services" and "statutes" suggests, if anything, that the Division of Assets Act was not intended to remove other sources of protection. Surely the selection of these terms provides no support for the view that Congress meant to impose new procedural requirements on pre-existing tribal land claims based not only on statutory provisions, but also on treaty rights and federal common law.[11]

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[8] See generally F. Cohen, Handbook of Federal Indian Law 486–493 (1982 ed.); Cohen, Original Indian Title, 32 Minn. L. Rev. 298 (1947); Note, Indian Title: The Rights of American Natives in Lands They Have Occupied Since Time Immemorial, 75 Colum. L. Rev. 655 (1975)

[9] This Court long has respected grants of land to Indian tribes by prior governments. See, *e. g.*, *United States* v. *Title Insurance & Trust Co.*, 265 U. S. 472, 484 (1924), quoting *Baker* v. *Harvey*, 181 U. S. 481, 491–492 (1901) ("'There is an essential difference between the power of the United States over lands to which it has had full title, and of which it has given to an Indian tribe a temporary occupancy, and that over lands which were subjected by the action of some prior government to a right of permanent occupancy, for in the latter case the right, which is one of private property, antecedes and is superior to the title of this government, and limits necessarily its powers of disposal'"); *Mitchel* v. *United States*, 9 Pet. 711 (1835).

[10] The federal common-law rule against alienation of aboriginal title without the consent of the sovereign was recognized as early as 1823 in Chief Justice Marshall's opinion for the Court in *Johnson* v. *M'Intosh*, 8 Wheat. 543, 573–574 (1823), and it is reflected in the Constitution's Indian Commerce Clause, Art. I, § 8, cl. 3, which made "Indian relations . . . the exclusive province of federal law," *Oneida II*, —— U. S., at —— and n. 4 (slip op. 7). See Clinton & Hotopp, Judicial Enforcement of the Federal Restraints on Alienation of Indian Land: The Origins of the Eastern Land Claims, 31 Maine L. Rev. 17, 28–29 (1979). In *Oneida II*, the Court rejected a suggestion that Indian common-law rights to tribal lands were somehow swallowed up or pre-empted by the Nonintercourse Act; it made clear that the common law still furnishes an independent basis for legal relief. See —— U. S., at —— (slip op. 8–12).

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[11] The Tribe's complaint requests relief under the treaties of 1760 and 1763, the Nonintercourse Act, the Indian Commerce Clause, Art. I, § 8, cl. 3, and the constitutional prohibition against state treaties, Art. I, § 10, cl. 1. App. 24. Reading the complaint liberally "so . . . as to do substantial justice," Fed. Rule Civ. Proc. 8(f), I would conclude that the constitutional references suffice to invoke the rule that original Indian title may not be alienated without federal approval. Cf. Brief for United States as *Amicus Curiae* in *Connecticut* v. *Mohegan Tribe*, O. T. 1980, No. 80-1365, p. 7 (describing the rule as "constitutionally based"). A narrower construction of the complaint would be especially inappropriate because the Tribe adopted the United States' brief in *Mohegan Tribe* as part of its response in the District Court to the defendants' motion to dismiss, making clear that the constitutional claims raised in the complaint were to be read to embrace the common-law rule. See Plaintiff's Memorandum in Support of Motion for Leave to File Supplemental Memorandum and Supplemental Memorandum, 1 Record, Exh. 15.

Because, under my view, the Tribe's treaty claims add nothing material for present purposes to its common-law claim, I would not decide at this time whether the 1760 and 1763 treaties independently required the United States, as successor to Great Britain, to approve any sale or lease of the 144,000 acres. Why the majority finds no need to discuss this question, or the issue of common-law restraints on alienation, is harder to understand.

B

The second provision of the 1959 Act relied on by the Court directs that "the laws of the several States shall apply to them in the same manner they apply to other persons or citizens within their jurisdiction." I agree with the Court that the word "them" must be understood to refer not only to individual Catawbas, but also to the Tribe. See *ante*, at 8–9. Clearly, however, "them" does not refer to *claims* brought by the Catawbas; the term encompasses the plaintiff in this case, but not the cause of action.

This distinction is critical. The "laws of the several States" provision of the Division of Assets Act placed the Catawbas on the same footing as non-Indians with regard to the application of state law. Just as a non-Indian's action based on South Carolina law must be brought within the time specified by the State, so a state-law action brought by a Catawba—or by the Catawba Tribe—must meet the same requirement. If a non-Indian in South Carolina brings a *federal* claim, however, the limitations period is determined by federal law. The same must hold for the federal claims raised by the Catawbas in this litigation.

Of course, the real question in this case is not whether federal law governs the limitations question, but whether federal law should borrow South Carolina's period of limitations, notwithstanding the general federal policy against such borrowing in the context of Indian land claims. My point here is that this question is not answered by the statutory instruction to apply state law to the Catawbas "in the same manner" as it is applied to non-Indians. Subjecting a group of Indians to state law to the same extent as other citizens is far different from subjecting their unique federal claims to a state statute of limitations. For non-Indians as well as Indians, the decision whether to apply a state limitations period to a federal claim depends on whether such application is deemed contrary to federal policy. And nothing in § 5 of the Division of Assets Act unambiguously directs that, as a matter of federal policy, the Catawbas' unsettled tribal claims should be treated any differently for statute-of-limitations purposes from other tribal land claims. Indeed, there is no indication that Congress thought about such claims at all.[12]

C

The Court does not rely exclusively on the terms of the two provisions discussed above; it also emphasizes that the Division of Assets Act as a whole represented an "explicit redefinition of the relationship between the Federal Government and the Catawbas," terminating "special federal protection" for the Tribe and its members. *Ante*, at 10; see also *ante*, at 12.[13] But if we take seriously the "eminently sound and vital canon" that all ambiguities in statutes passed for the benefit of Indians are to be construed in the Indians' favor, *Northern Cheyenne Tribe*, 425 U. S., at 655, n. 7, then surely the effect of such an "explicit redefinition" must be limited to its explicit terms. The Court recognized as much in *Menominee Tribe*, *supra*, when it refused to read into the Menominee Termination Act an abrogation of the Menominees' treaty rights to hunt and fish. Regardless of the general thinking behind the termination policy of the 1950's, we are faced here with a particular statute, and we should not "'strain to implement [an assimilationist] policy Congress has now rejected.'" *Bryan* v. *Itasca County*, 426 U. S., at 389, n. 14, quoting *Santa Rosa Band of Indians* v. *Kings County*, 532 F. 2d 655, 663 (CA9 1975).

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[12] The Senate and House Reports both explained that the purpose of the 1959 legislation was "to distribute the bulk of the [Catawbas'] tribal assets" among the members of the Tribe. S. Rep. No. 863, 86th Cong., 1st Sess., 1 (1959); H. R. Rep. No. 910, 86th Cong., 1st Sess., 2 (1959). Each report contained a list of the Tribe's assets; the list made no mention of the Catawbas' claim to their 18th century treaty lands. See S. Rep. No. 863, at 3; H. R. Rep. No. 910, at 4.

[13] The majority rightly places little weight on the fact that § 5 of the 1959 Act revoked the Tribe's constitution. The Catawbas had no tribal constitution until 1944, when they adopted one pursuant to the 1943 Memorandum of Understanding. See, *e. g.*, H. R. Rep. No. 910, 86th Cong., 1st Sess., 5 (1959). Revocation of the constitution therefore can hardly be understood as a statement that the Tribe should cease existence or lose any pre-existing claims.

Such straining is particularly inappropriate in this case, where the statute in question was passed at the Indians' behest, was apparently intended to carry out the Indians' wishes, and received the Indians' support based on federal assurances that it would not "affect the status" of their claim against the State. One, of course, can distinguish formally, as the majority does, see *ante*, at 12, between preserving the "status" of the claim and preserving the claim's immunity from the state statute of limitations. But the distinction smacks of the kind of semantic trap that this Court consistently has attempted to avoid when construing governmental agreements with Indians and statutes ostensibly passed for the benefit of Indians. In cases involving Indian treaties, for example, it has long been the rule not only that doubtful expressions must be construed in the Indians' favor, but also that the entire treaty must be interpreted as the Indians would have understood it. See, *e. g., Choctaw Nation* v. *Oklahoma*, 397 U. S. 620, 631 (1970); *Jones* v. *Meehan*, 175 U. S. 1, 11 (1899); *Worcester* v. *Georgia*, 6 Pet. 515, 582 (1832).

The Catawbas were assured in unqualified terms that the 1959 legislation would not jeopardize their century-old grievance against the State of South Carolina. The Act itself said nothing about the claim, and nothing about statutes of limitations. No one told the Indians or the voting members of Congress that the statute might someday prevent the Tribe from pursuing its claim in court. The Court nevertheless concludes today that the 1959 Act bars the Catawbas' claim if the limitations period under South Carolina law expired between the passage of the Act and the initiation of this lawsuit in 1980, and that this interpretation of the statute comports with the promises made to the Catawbas in the 1950's. I cannot agree with either conclusion. In my view, this decision breaks faith once again with the Tribe, and it does so in a way the statute does not require. Nothing in the text or legislative history of the Act evinces a congressional desire to mislead the Indians, or an understanding that the Act sometime might be construed as it is by the Court today.

III

Apparently, there no longer are any full-blood Catawbas, and no one now speaks the Catawba language. See Charlotte Observer, Mar. 6, 1977, p. 1C, reprinted in Hearing, at 420. Of the 1200 or so persons currently on the tribal roll, only about 5 or 10 percent live on the 630-acre reservation still held for the Tribe by the State of South Carolina.[14] The reservation itself does not differ conspicuously from other rural neighborhoods in South Carolina. Indeed, "[a]n unobservant tourist may well drive through the reservation unawares, and many do." C. Hudson, The Catawba Nation 3 (1970). For the most part, modern-day Catawbas "think and live like ordinary Americans of the Southeast." *Ibid.*

When an Indian Tribe has been assimilated and dispersed to this extent—and when, as the majority points out, thousands of people now claim interests in the Tribe's ancestral homeland, see *ante*, at 1 and 2, n. 4—the Tribe's claim to that land may seem ethereal, and the manner of the Tribe's dispossession may seem of no more than historical interest. But the demands of justice do not cease simply because a wronged people grow less distinctive, or because the rights of innocent third parties must be taken into account in fashioning a remedy. Today's decision seriously handicaps the Catawbas' effort to obtain even partial redress for the illegal expropriation of lands twice pledged to them, and it does so by attributing to Congress, in effect, an unarticulated intent to trick the Indians a century after the property changed hands. From any perspective, there is little to be proud of here.

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[14] See, *e. g.*, Hearing, at 20 (statement of Leo M. Krulitz, Interior Department Solicitor); *id.*, at 39 (statement of Claude Ayres, Member, Catawba Indian Nation Land Claim Committee); Proposed Catawba Indian Reservation Land Use Analysis 4 (1977), reprinted in Hearing, at 251, 258.

Because I do not believe that Congress in 1959 expressed an unambiguous desire to encumber the Catawbas' claim to their 18th century treaty lands, and because I agree with Justice Black that "[g]reat nations, like great men, should keep their word," *FPC* v. *Tuscarora Indian Nation*, 362 U. S. 99, 142 (1960) (dissenting opinion), I do not join the judgment of the Court.

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(Slip Opinion)

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Lumber Co.*, 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

MIDLANTIC NATIONAL BANK *v.* NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 84–801. Argued October 16, 1985—Decided January 27, 1986*

Quanta Resources Corp. (Quanta) processed waste oil at facilities located in New York and New Jersey. The New Jersey Department of Environmental Protection (NJDEP) discovered that Quanta had violated a provision of the operating permit for the New Jersey facility by accepting oil contaminated with a toxic carcinogen. During negotiations with NJDEP for the cleanup of the New Jersey site, Quanta filed a petition for reorganization under Chapter 11 of the Bankruptcy Code, and after NJDEP had issued an order requiring cleanup, Quanta converted the action to a liquidation proceeding under Chapter 7. An investigation of the New York facility then revealed that Quanta had also accepted similarly contaminated oil at that site. The trustee notified the creditors and the Bankruptcy Court that he intended to abandon the property under § 554(a) of the Bankruptcy Code, which authorizes a trustee to "abandon any property of the estate that is burdensome to the estate or that is of inconsequential value to the estate." The City and the State of New York objected, contending that abandonment would threaten the public's health and safety, and would violate state and federal environmental law. The Bankruptcy Court approved the abandonment, and after the District Court affirmed an appeal was taken to the Court of Appeals for the Third Circuit. Meanwhile, the Bankruptcy Court also approved the trustee's proposed abandonment of the New Jersey facility over NJDEP's objection, and NJDEP took a direct appeal to the Court

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*Together with No. 84–805, *O'Neill, Trustee in Bankruptcy of Quanta Resources Corp., Debtor* v. *City of New York, et al.*, and *O'Neill, Trustee in Bankruptcy of Quanta Resources Corp., Debtor* v. *New Jersey Department of Environmental Protection*, also on certiorari to the same court.

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of Appeals. In separate judgments, the Court of Appeals reversed, holding that the Bankruptcy Court erred in permitting abandonment.

Held: A trustee in bankruptcy may not abandon property in contravention of a state statute or regulation that is reasonably designed to protect the public health or safety from identified hazards. Congress did not intend for § 554(a) to pre-empt all state and local laws. A bankruptcy court does not have the power to authorize an abandonment without formulating conditions that will adequately protect the public's health and safety. Pp. 5–12.

(a) Before the 1978 revisions of the Bankruptcy Code, which codified in § 554 the judicially developed rule of abandonment, the trustee's abandonment power had been limited by a judicially developed doctrine intended to protect legitimate state and federal interests. In codifying the rule of abandonment, Congress also presumably included the corollary that a trustee could not exercise his abandonment power in violation of certain state and federal laws. Pp. 5–7.

(b) Neither this Court's decisions nor Congress has granted a trustee in bankruptcy powers that would lend support to a right to abandon property in contravention of state or local laws designed to protect public health or safety. Where the Bankruptcy Code has conferred other special powers upon the trustee and where there was no common-law limitation on such powers, Congress has expressly provided that the trustee's efforts to marshal and distribute the estate's assets must yield to governmental interests in public health and safety. It cannot be assumed that Congress, having placed such limitations upon other aspects of trustees' operations, intended to discard the well-established judicial restriction on the abandonment power. Moreover, 28 U. S. C. § 959(b), which commands the trustee to "manage and operate the property in his possession . . . according to the requirements of the valid laws of the State," provides additional evidence that Congress did not intend for the Bankruptcy Code to pre-empt all state laws. Pp. 7–10.

(c) Additional support for restricting the abandonment power is found in repeated congressional emphasis, in other statutes, on the goal of protecting the environment against toxic pollution. Pp. 10–11.

739 F. 2d 912 and 739 F. 2d 927, affirmed.

POWELL, J., delivered the opinion of the Court, in which BRENNAN, MARSHALL, BLACKMUN, and STEVENS, JJ., joined. REHNQUIST, J., filed a dissenting opinion, in which BURGER, C. J., and WHITE and O'CONNOR, JJ., joined.

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D. C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

Nos. 84–801 AND 84–805

MIDLANTIC NATIONAL BANK, PETITIONER
84–801 *v.*
NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION

THOMAS J. O'NEILL, TRUSTEE IN BANKRUPTCY OF QUANTA RESOURCES CORPORATION, DEBTOR, PETITIONER
84–805 *v.*
CITY OF NEW YORK ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

[January 27, 1986]

JUSTICE POWELL delivered the opinion of the Court.

These petitions for certiorari, arising out of the same bankruptcy proceeding, present the question whether § 554(a) of the Bankruptcy Code, 11 U. S. C. § 554(a),[1] authorizes a trustee in bankruptcy to abandon property in contravention of state laws or regulations that are reasonably designed to protect the public's health or safety.

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[1] Section 554(a) reads:

"After notice and a hearing, the trustee may abandon any property of the estate that is burdensome to the estate or that is of inconsequential value to the estate."

Technical amendments in the Bankruptcy Amendments and Federal Judgeship Act of 1984 added the words "and benefit" after "value" in § 554(a). Pub. L. 98–353, Tit. III, § 468(a), 98 Stat. 380.

I

Quanta Resources Corporation (Quanta) processed waste oil at two facilities, one in Long Island City, New York, and the other in Edgewater, New Jersey. At the Edgewater facility, Quanta handled the oil pursuant to a temporary operating permit issued by the New Jersey Department of Environmental Protection (NJDEP), respondent in No. 84–801. In June 1981, Midlantic National Bank, petitioner in No. 84–801, provided Quanta with a $600,000 loan secured by Quanta's inventory, accounts receivable, and certain equipment. The same month, NJDEP discovered that Quanta had violated a specific prohibition in its operating permit by accepting more than 400,000 gallons of oil contaminated with PCB, a highly toxic carcinogen. NJDEP ordered Quanta to cease operations at Edgewater, and the two began negotiations concerning the cleanup of the Edgewater site. But on October 6, 1981, before the conclusion of negotiations, Quanta filed a petition for reorganization under Chapter 11 of the Bankruptcy Code. The next day, NJDEP issued an administrative order requiring Quanta to clean up the site. Quanta's financial condition remained perilous, however, and the following month, it converted the action to a liquidation proceeding under Chapter 7. Thomas J. O'Neill, petitioner in No. 84–805, was appointed trustee in bankruptcy, and subsequently oversaw abandonment of both facilities.

After Quanta filed for bankruptcy, an investigation of the Long Island City facility revealed that Quanta had accepted and stored there over 70,000 gallons of toxic, PCB-contaminated oil in deteriorating and leaking containers. Since the mortgages on that facility's real property exceeded the property's value, the estimated cost of disposing of the waste oil plainly rendered the property a net burden to the estate. After trying without success to sell the Long Island City property for the benefit of Quanta's creditors, the trustee notified the creditors and the Bankruptcy Court for the District of New Jersey that he intended to abandon the property pursuant to § 554(a). No party to the bankruptcy proceeding disputed the trustee's allegation that the site was "burdensome" and of "inconsequential value to the estate" within the meaning of § 554.

The City and the State of New York (collectively New York), respondents in No. 84–805, nevertheless objected, contending that abandonment would threaten the public's health and safety, and would violate state and federal environmental law. New York rested its objection on "public policy" considerations reflected in applicable local laws, and on the requirement of 28 U. S. C. § 959(b), that a trustee "manage and operate" the property of the estate "according to the requirements of the valid laws of the State in which such property is situated." New York asked the Bankruptcy Court to order that the assets of the estate be used to bring the facility into compliance with applicable law. After briefing and argument, the court approved the abandonment, noting that "[t]he City and State are in a better position in every respect than either the Trustee or debtor's creditors to do what needs to be done to protect the public against the dangers posed by the PCB-contaminated facility." The District Court for the District of New Jersey affirmed, and New York appealed to the Court of Appeals for the Third Circuit.

Upon abandonment, the trustee removed the 24-hour guard service and shut down the fire-suppression system. It became necessary for New York to decontaminate the facility, with the exception of the polluted subsoil, at a cost of about $2.5 million.[2]

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[2] The sole issue presented by these petitions is whether a trustee may abandon property under § 554 in contravention of local laws designed to protect the public's health and safety. New York is claiming reimbursement for its expenditures as an administrative expense. That question, however, like the question of the ultimate disposition of the property, is not before us.

On April 23, 1983, shortly after the District Court had approved abandonment of the New York site, the trustee gave notice of his intention to abandon the personal property at the Edgewater site, consisting principally of the contaminated oil. The Bankruptcy Court approved the abandonment on May 20, over NJDEP's objection that the estate had sufficient funds to protect the public from the dangers posed by the hazardous waste.[3]

Because the abandonments of the New Jersey and New York facilities presented identical issues, the parties in the New Jersey litigation consented to NJDEP's taking a direct appeal from the Bankruptcy Court to the Court of Appeals pursuant to § 405(c)(1)(B) of the Bankruptcy Act of 1978.

A divided panel of the Court of Appeals for the Third Circuit reversed. *In re Quanta Resources Corp.*, 739 F. 2d 912 (1984); *In re Quanta Resources Corp.*, 739 F. 2d 927. Although the court found little guidance in the legislative history of § 554, it concluded that Congress had intended to codify the judge-made abandonment practice developed under the previous Bankruptcy Act. Under that law, where state law or general equitable principles protected certain public interests, those interests were not overridden by the judge-made abandonment power. The court also found evidence in other provisions of the Bankruptcy Code that Congress did not intend to pre-empt all state regulation, but only that grounded on policies outweighed by the relevant federal interests. Accordingly, the Court of Appeals held that the Bankruptcy Court erred in permitting abandonment, and remanded both cases for further proceedings.[4]

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[3] The trustee was not required to take even relatively minor steps to reduce imminent danger, such as security fencing, drainage and diking repairs, sealing deteriorating tanks, and removing explosive agents. Moreover, the trustee's abandonment at both sites aggravated already existing dangers by halting security measures that prevented public entry, vandalism, and fire. Joint Appendix in No. 83-5142 (CA3), pp. 11-12 (affidavit of Richard Docyk, Deputy Chief Inspector for N. Y. City Fire Department); *id.*, at 26 (transcript of proceedings before De Vito, J.). The 470,000 gallons of highly toxic and carcinogenic waste oil in unguarded, deteriorating containers "present risks of explosion, fire, contamination of water supplies, destruction of natural resources, and injury, genetic damage, or death through personal contact." Brief for United States as *Amicus Curiae* 4, 23; see Joint Appendix, *supra*, at 17 (70,000 gallons at New York site); Appendix in No. 83-5730 (CA3), p. A7 (400,000 gallons at New Jersey site); *id.*, at A46 (deteriorating containers); Joint Appendix, *supra*, at 11 (deteriorating tanks); *id.*, at 26 (guard service); *id.*, at 12 (risk of fire); *id.*, at 11 (contamination of adjacent areas); *id.*, at 20 (health effects of exposure to PCBs and their derivatives).

We granted certiorari and consolidated these cases to determine whether the Court of Appeals properly construed § 554, 469 U. S. ——. We now affirm.

II

Before the 1978 revisions of the Bankruptcy Code, the trustee's abandonment power had been limited by a judicially developed doctrine intended to protect legitimate state or federal interests. This was made clear by the few relevant cases. In *Ottenheimer* v. *Whitaker*, 198 F. 2d 289 (CA4 1952), the Court of Appeals concluded that a bankruptcy trustee, in liquidating the estate of a barge company, could not abandon several barges when the abandonment would have obstructed a navigable passage in violation of federal law. The court stated:

> "The judge-made [abandonment] rule must give way when it comes into conflict with a statute enacted in order to ensure the safety of navigation; for we are not dealing with a burden imposed upon the bankrupt or his property by contract, but a duty and a burden imposed

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[4] Judge Gibbons dissented, arguing that § 554 permits abandonment without any exception analogous to that provided to the automatic stay. The dissent further contended that the majority's interpretation of § 554 raised substantial questions under the Takings Clause by potentially destroying the interest of secured creditors, see *United States* v. *Security Industrial Bank*, 459 U. S. 70 (1982), and that the majority had failed to address the important underlying issue of the priority of the States' claims for reimbursement.

upon an owner of vessels by an Act of Congress in the public interest." *Id.*, at 290.

In *In re Chicago Rapid Transit Co.*, 129 F. 2d 1 (CA7), cert. denied, 317 U. S. 683 (1942), the Court of Appeals held that the trustee of a debtor transit company could not cease its operation of a branch railway line when local law required continued operation. While the court did not forbid the trustee to abandon property (*i. e.*, to reject an unexpired lease), it conditioned his actions to ensure compliance with state law. Similarly, in *In re Lewis Jones, Inc.*, 1 BCD 277 (Bkrtcy Ct. ED Pa. 1974), the bankruptcy court invoked its equitable power to "safeguard the public interest" by requiring the debtor public utilities to seal underground steam lines before abandoning them.

Thus, when Congress enacted § 554, there were well-recognized restrictions on a trustee's abandonment power. In codifying the judicially developed rule of abandonment, Congress also presumably included the established corollary that a trustee could not exercise his abandonment power in violation of certain state and federal laws. The normal rule of statutory construction is that if Congress intends for legislation to change the interpretation of a judicially created concept, it makes that intent specific. *Edmonds* v. *Compagnie Generale Transatlantique*, 443 U. S. 256, 266–267 (1979). The Court has followed this rule with particular care in construing the scope of bankruptcy codifications. If Congress wishes to grant the trustee an extraordinary exemption from non-bankruptcy law, "the intention would be clearly expressed, not left to be collected or inferred from disputable considerations of convenience in administering the estate of the bankrupt." *Swarts* v. *Hammer*, 194 U. S. 441, 444 (1904); see *Palmer* v. *Massachusetts*, 308 U. S. 79, 85 (1939) ("If this old and familiar power of the states [over local railroad service] was withdrawn when Congress gave district courts bankruptcy powers over railroads, we ought to find language fitting for so drastic a change"). Although these cases do not define for us the exact contours of the trustee's abandonment power, they do make clear that this power was subject to certain restrictions when Congress enacted § 554(a).

III

Neither the Court nor Congress has granted a trustee in bankruptcy powers that would lend support to a right to abandon property in contravention of state or local laws designed to protect public health or safety. As we held last Term when the State of Ohio sought compensation for cleaning the toxic waste site of a bankrupt corporation:

> "Finally, we do not question that anyone in possession of the site—whether it is [the debtor] or another in the event the receivership is liquidated and the trustee abandons the property, or a vendee from the receiver *or the bankruptcy trustee*—must comply with the environmental laws of the State of Ohio. Plainly, that person or firm may not maintain a nuisance, pollute the waters of the State, or refuse to remove the source of such conditions." *Ohio* v. *Kovas*, 469 U.S. ——, —— - —— (1985) (emphasis added).

Congress has repeatedly expressed its legislative determination that the trustee is not to have *carte blanche* to ignore nonbankruptcy law. Where the Bankruptcy Code has conferred special powers upon the trustee and where there was no common-law limitation on that power, Congress has expressly provided that the efforts of the trustee to marshal and distribute the assets of the estate must yield to governmental interest in public health and safety. *Post*, at 8–9. One cannot assume that Congress, having placed these limitations upon other aspects of trustees' operations, intended to discard a well-established judicial restriction on the abandonment power. As we held nearly two years ago in the context of the National Labor Relations Act, "[T]he debtor-in-possession is not relieved of all obligations under the [Act] simply by filing a petition for bankruptcy." *NLRB* v. *Bildisco & Bildisco*, 465 U. S. 513, 534 (1984).

The automatic stay provision of the Bankruptcy Code, § 362(a),[5] has been described as "one of the fundamental debtor protections provided by the bankruptcy laws." S. Rep. No. 95–989, p. 54 (1978); H. R. Rep. No. 95–595, p. 340 (1977). Despite the importance of § 362(a) in preserving the debtor's estate, Congress has enacted several categories of exceptions to the stay that allow the Government to commence or continue legal proceedings. For example, § 362(b)(5) permits the Government to enforce "nonmonetary" judgments against a debtor's estate. It is clear from the legislative history that one of the purposes of this exception is to protect public health and safety:

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[5] Section 362(a) provides:

"(a) Except as provided in subsection (b) of this section, a petition filed under section 301, 302, or 303 of this title, or an application filed under section 5(a)(3) of the Securities Investor Protection Act of 1970 (15 U. S. C. 78eee(a)(3)), operates as a stay, applicable to all entities, of—

"(1) the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title;

"(2) the enforcement, against the debtor or against property of the estate, of a judgment obtained before the commencement of the case under this title;

"(3) any act to obtain possession of property of the estate or of property from the estate;

"(4) any act to create, perfect, or enforce any lien against property of the estate;

"(5) any act to create, perfect, or enforce against property of the debtor any lien to the extent that such lien secures a claim that arose before the commencement of the case under this title;

"(6) any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the case under this title;

"(7) the setoff of any debt owing to the debtor that arose before the commencement of the case under this title against any claim against the debtor; and

"(8) the commencement or continuation of a proceeding before the United States Tax Court concerning the debtor."

> "Thus, where a governmental unit is suing a debtor to prevent or stop violation of fraud, *environmental protection*, consumer protection, *safety, or similar police or regulatory laws*, or attempting to fix damages for violation of such a law, the action or proceeding is not stayed under the automatic stay." H. R. Rep. No. 95–595, *supra*, at 343 (emphasis added); S. Rep. No. 95–989, *supra*, at 52 (emphasis added).

Petitioners have suggested that the existence of an express exception to the automatic stay undermines the inference of a similar exception to the abandonment power: had Congress sought to restrict similarly the scope of § 554, it would have enacted similar limiting provisions. This argument, however, fails to acknowledge the differences between the predecessors of §§ 554 and 362. As we have noted, the exceptions to the judicially created abandonment power were firmly established. But in enacting § 362 in 1978, Congress significantly broadened the scope of the automatic stay, see 1 W. Norton, Bankruptcy Law and Practice § 20.03, pp. 5–6 (1981), an expansion that had begun only five years earlier with the adoption of the Bankruptcy Rules in 1973, see *id.*, § 20.02, at 4–5. Between 1973 and 1978, some courts had stretched the expanded automatic stay to foreclose States' efforts to enforce their antipollution laws,[6] and Congress wanted to overrule these interpretations in its 1978 revision. See H. R. Rep. 95–595, *supra*, at 174–175. In the face of the greatly increased scope of § 362, it was necessary for Congress to limit this new power expressly.

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[6] See, *e. g.*, *Hillsdale Foundry Co.* v. *Michigan ex rel. Kelly*, 1 BCD 195 (Bkrtcy Ct. WD Mich. 1974) (action by Michigan Attorney General to enforce State's antipollution laws held subject to automatic stay). The House Report also referred to an unreported case from Texas where a stay prevented the State of Maine from closing down a debtor's plant that was polluting a river in violation of the State's environmental protection laws. H. R. Rep. No. 95–595, pp. 174–175.

Title 28 U. S. C. § 959(b)[7] provides additional evidence that Congress did not intend for the Bankruptcy Code to pre-empt all state laws. Section 959(b) commands the trustee to "manage and operate the property in his possession . . . according to the requirements of the valid laws of the State." The petitioners have contended that § 959(b) is relevant only when the trustee is actually operating the business of the debtor, and not when he is liquidating it. Even though § 959(b) does not directly apply to an abandonment under § 554(a) of the Bankruptcy Code—and therefore does not delimit the precise conditions on an abandonment—the section nevertheless supports our conclusion that Congress did not intend for the Bankruptcy Code to pre-empt all state laws that otherwise constrain the exercise of a trustee's powers.

IV

Although the reasons elaborated above suffice for us to conclude that Congress did not intend for the abandonment power to abrogate certain state and local laws, we find additional support for restricting that power in repeated congressional emphasis on its "goal of protecting the environment against toxic pollution." *Chemical Manufacturers Assn., Inc.* v. *Natural Resources Defense Council, Inc.*, 470 U. S. ——, —— (1985). Congress has enacted a Resource Conservation and Recovery Act, 42 U. S. C. §§ 6901–6987, to regulate the treatment, storage, and disposal of hazardous wastes by monitoring wastes from their creation until after their permanent disposal. That Act authorizes the United States to seek judicial or administrative restraint of activities involving hazardous wastes that "may present an imminent and substantial endangerment to health or the environment." 42 U. S. C. § 6973; see also S. Rep. No. 98–284, p. 58 (1983). Congress broadened the scope of the statute and tightened the regulatory restraints in 1984.[8] In the Comprehensive Environmental Response, Compensation, and Liability Act, as amended by Pub. L. 98–80, § 2(c)(2)(B), Congress established a fund to finance cleanup of some sites and required certain responsible parties to reimburse either the fund or the parties who paid for the cleanup. The Act also empowers the Federal Government to secure such relief as may be necessary to avert "imminent and substantial endangerment to the public health or welfare or the environment because of an actual or threatened release of a hazardous substance." 42 U. S. C. § 9606. In the face of Congress' undisputed concern over the risks of the improper storage and disposal of hazardous and toxic substances, we are unwilling to presume that by enactment of § 554(a), Congress implicitly overturned long-standing restrictions on the common-law abandonment power.

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[7] Section 959(b) provides:

"Except as provided in section 1166 of title 11, a trustee, receiver or manager appointed in any cause pending in any court of the United States, including a debtor in possession, shall manage and operate the property in his possession as such trustee, receiver or manager according to the requirements of the valid laws of the State in which such property is situated, in the same manner that the owner or possessor thereof would be bound to do if in possession thereof."

V

In the light of the Bankruptcy trustee's restricted pre-1978 abandonment power and the limited scope of other Bankruptcy Code provisions, we conclude that Congress did not intend for § 554(a) to pre-empt all state and local laws. The Bankruptcy Court does not have the power to authorize an abandonment without formulating conditions that will adequately protect the public's health and safety. Accordingly, without reaching the question whether certain state laws imposing conditions on abandonment may be so onerous as to interfere with the bankruptcy adjudication itself, we hold that a trustee may not abandon property in contravention of a state statute or regulation that is reasonably designed to protect the public health or safety from identified hazards.[9] Accordingly, we affirm the judgments of the Court of Appeals for the Third Circuit.

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[8] Congress eliminated the small generator exception and subjected many more facilities to the regulations. Pub. L. 98–616, 98 Stat. 3221, 3248–3272 (codified at 42 U. S. C. A. § 6921(d) (Supp. 1985)). Another provision automatically broadens the Act's coverage by automatically assigning a hazardous rating to substances that the EPA does not classify by a set deadline. 98 Stat. 3227–3231 (codified at 42 U. S. C. A. §§ 6924(d), (e), (f)(3), (g)(6) (Supp. 1985)). Amended enforcement provisions allow more citizen suits, 98 Stat. 3271–3272 (codified at 42 U. S. C. A. § 6973 (Supp. 1985)), and authorize administrative orders or suits to compel "corrective action" after a leak has occurred. 98 Stat. 3257–3258 (codified at 42 U. S. C. A. § 6928(h) (Supp. 1985)).

It is so ordered.

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[9] This exception to the abandonment power vested in the trustee by § 554 is a narrow one. It does not encompass a speculative or indeterminate future violation of such laws that may stem from abandonment. The abandonment power is not to be fettered by laws or regulations not reasonably calculated to protect the public health or safety from imminent and identifiable harm.

SUPREME COURT OF THE UNITED STATES

Nos. 84-801 AND 84-805

MIDLANTIC NATIONAL BANK, PETITIONER
84-801 *v.*
NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION

THOMAS J. O'NEILL, TRUSTEE IN BANKRUPTCY OF QUANTA RESOURCES CORPORATION, DEBTOR, PETITIONER
84-805 *v.*
CITY OF NEW YORK ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

[January 27, 1986]

JUSTICE REHNQUIST, with whom THE CHIEF JUSTICE, JUSTICE WHITE and JUSTICE O'CONNOR join, dissenting.

The Court today concludes that Congress did not intend the abandonment provision of the Bankruptcy Code, 11 U. S. C. § 554(a), to preempt "certain state and local laws." In something of a surprise ending, the Court limits the class of laws that can prevent an otherwise authorized abandonment by a trustee to those "reasonably designed to protect the public health or safety from identified hazards." While this limitation reduces somewhat the scope of my disagreement with the result reached, it renders both the *ratio decidendi* and the import of the Court's opinion quite unclear. More important, I remain unconvinced by the Court's arguments supporting state power to bar abandonment. The principal and only independent ground offered—that Congress codified "well-recognized restrictions of a trustee's abandonment power"—is particularly unpersuasive. It rests on a misreading of three pre-Code cases, the elevation of that misreading into a "well-recognized" exception to the abandonment power, and the unsupported assertion that Congress must have meant to codify the exception (or something like it). These specific shortcomings in the Court's analysis, which are addressed in greater detail below, stem at least in part from the Court's failure to discuss even in passing either the nature of abandonment or its role in federal bankruptcy.

Abandonment is "the release from the debtor's estate of property previously included in that estate." 2 W. Norton, Bankruptcy Law and Practice § 39.01 (1984), citing *Brown* v. *O'Keefe*, 300 U. S. 598, 602–603 (1937). Prior to enactment of the Bankruptcy Code in 1978, there was no statutory provision specifically authorizing abandonment in liquidation cases. By analogy to the trustee's statutory power to reject executory contracts, courts had developed a rule permitting the trustee to abandon property that was worthless or not expected to sell for a price sufficiently in excess of encumbrances to offset the costs of administration. 4 L. King, Collier on Bankruptcy ¶ 554.01 (15th ed. 1985) (hereinafter Collier).[1] This judge-made rule served the overriding purpose of bankruptcy liquidation: the expeditious reduction of the debtor's property to money, for equitable distribution to creditors, *Kothe* v. *R. C. Taylor Trust*, 280 U. S. 224, 227 (1930). 4 Collier ¶ 554.01. Forcing the trustee to administer burdensome property would contradict this purpose, slowing the administration of the estate and draining its assets.

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[1] Under the former Bankruptcy Act, title to the debtor's property vested in the trustee. Abandonment divested the trustee of title and revested it in the debtor. 4 Collier ¶ 554.02[2]. Under the Code, the trustee no longer takes title to the debtor's property, and he is simply divested of control over the property by the abandonment. *Ibid.* Although § 554 does not specify to whom the property is abandoned, the legislative history suggests that it is to the person having a possessory interest in the property. S. Rep. No. 95–989, p. 92 (1978); *Ohio* v. *Kovacs*, 469 U. S. ——, ——, n. 12 (1985).

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The Bankruptcy Code expressly incorporates the power of abandonment into federal bankruptcy legislation for the first time. The relevant provision bears repeating:

> "(a) After notice and a hearing, the trustee may abandon any property of the estate that is burdensome to the estate or that is of inconsequential value to the estate." 11 U. S. C. § 554(a) (amended 1984).

This language, absolute in its terms, suggests that a trustee's power to abandon is limited only by considerations of the property's value to the estate. It makes no mention of other factors to be balanced or weighed and permits no easy inference that Congress was concerned about state environmental regulations.[2] Indeed, as the Court notes, when Congress *was* so concerned it expressed itself clearly, specifically exempting some environmental injunctions from the automatic stay provisions of § 362 of the Code, 11 U. S. C. §§ 362(b)(4), (5) (1982 ed. and Supp. II). See *Ohio* v. *Kovacs*, 469 U. S. —— (1985).

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[2] Last Term in *Ohio* v. *Kovacs*, *supra*, which involved the dischargeability of certain environmental injunctions in bankruptcy, we briefly addressed the abandonment of hazardous waste sites:

"After notice and hearing, the trustee many abandon any property of the estate that is burdensome to the estate or that is of inconsequential value to the estate. 11 U. S. C. § 554. Such abandonment is to the person having the possessory interest in the property. S. Rep. No. 95–989, p. 92 (1978). . . . If the site at issue were [the debtor's] property, the trustee would shortly determine whether it was of value to the estate. If the property was worth more than the costs of bringing it into compliance with state law, the trustee would undoubtedly sell it for its net value, and the buyer would clean up the property, in which event whatever obligation [the debtor] might have had to clean up the property would have been satisfied. If the property were worth less than the cost of cleanup, the trustee would likely abandon it to its prior owner, who would have to comply with the state environmental law to the extent of his or its ability." *Id.*, at ——, n. 12.

Nor does the scant legislative history of § 554 support the Court's interpretation. Nowhere does that legislative history suggest that Congress intended to limit the trustee's authority to abandon burdensome property where abandonment might be opposed by those charged with the exercise of state police or regulatory powers.

The Court seeks to turn the seemingly unqualified language and the absence of helpful legislative history to its advantage. Adopting the reasoning of the Court of Appeals, the Court argues that in light of Congress' failure to elaborate, § 554 must have been intended to codify prior "abandonment" case law, and that under prior law "a trustee could not exercise his abandonment power in violation of certain state and federal laws," *ante*, at 6. I disagree. We have previously expressed our unwillingness to read into unqualified statutory language exceptions or limitations based upon legislative history unless that legislative history demonstrates with extraordinary clarity that this was indeed the intent of Congress. *E. g., Garcia* v. *United States*, 469 U. S. ——, ——, slip op. at 5 (1984). I think that upon analysis the "legislative history" relied upon by the Court here falls far short of this standard.

The Court relies on just three cases for its claimed "established corollary" to the pre-Code abandonment power. A close reading of those cases, however, reveals that none supports the rule announced today. In *Ottenheimer* v. *Whitaker*, 198 F. 2d 289 (CA4 1952), the Court of Appeals held that a trustee could not abandon worthless barges obstructing traffic in Baltimore Harbor when the abandonment would have violated federal law. The Court concluded that the "judge-made rule [of abandonment] must give way" to "an Act of Congress in the public interest." *Id.*, at 290. *Ottenheimer* thus depended on the need to reconcile a conflict between a judicial gloss on the Bankruptcy Act and the commands of another federal statute. We implicitly confirmed the validity of such an approach two Terms ago in *NLRB* v.

Bildisco & Bildisco, 465 U. S. 513, 523–524 (1984). Here, by contrast, the "conflict" is with the uncertain commands of state laws that the Court declines to identify.[3] In addition, the Court of Appeals relied heavily on the fact that the pre-Code law of abandonment was judge-made, which in turn raises the somewhat Delphic inquiry as to whether that court would have decided the case the same way under the present Code.

In re Lewis Jones, Inc., 1 Bankr. Ct. Dec. (CRR) 277 (ED Pa. 1974), was a Bankruptcy Court decision concluding that the principle of *Ottenheimer* did not apply because there was no conflicting statute. But because the right to abandon was based on judge-made law, the court nonetheless found itself free to protect the public interest by requiring a trustee seeking abandonment to first spend funds of the estate to seal manholes and vents in an underground pipe network. While this case admittedly comes closer to supporting the Court's position than does *Ottenheimer*, it too turns on the judge-made nature of the abandonment power. Moreover, I do not believe that the isolated decision of a single bankruptcy court rises to the level of "established law" that we can fairly assume Congress intended to incorporate. See *Merrill Lynch, Pierce, Fenner & Smith, Inc.* v. *Curran*, 456 U. S. 353, 379–382 (1982).

In *In re Chicago Rapid Transit Co.*, 129 F. 2d 1 (CA7), cert. denied *sub nom. Chicago Junction R. Co.* v. *Sprague*, 317 U. S. 683 (1942), the District Court sitting in bankruptcy had authorized the bankrupt to abandon a lease of a rail line, and a lessor appealed. The bankrupt did not appeal the District Court's imposition of conditions on the abandonment; the propriety of those conditions thus was not before the Court of Appeals, which affirmed the District Court's *authorization* of abandonment. So while there may be *dicta* in the Court of Appeals' opinion that would support some limitation on the power of abandonment, the holding of the case certainly does not. In short, none of these cases supports the Court's view that § 554(a) contains an implicit exception for "certain state and local laws."

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[3] The Court finds "additional support" for its restriction of the abandonment power in recent federal statutes concerned with protecting the environment. If these statutes operated to bar abandonment here—something neither respondents nor the Court suggests—then this might be a different case. See *NLRB* v. *Bildisco & Bildisco*, 465 U. S. 513 (1984). But the statutes do not bar abandonment, and the majority's reference to their obvious concern over the risks of storing hazardous substances is little more than a make-weight.

Even assuming these cases stand for the proposition ascribed to them in the Court's opinion, that opinion's brief discussion of the cases, *ante*, at 5–7, certainly does not support the claim that they reflect an "established corollary" to pre-Code abandonment law. Generally speaking, three rather isolated cases do not constitute the sort of settled law that we can fairly assume Congress intended to codify absent some expression of its intent to do so. Perhaps recognizing this, respondents place substantial reliance for their view that the exception was "well settled" on the following statement in the (pre-Code) 14th edition of Collier on Bankruptcy, accompanying a citation to *Ottenheimer* and *Chicago Rapid Transit*: "Recent cases illustrate, however, that the trustee in the exercise of the power to abandon is subject to the application of general regulations of a police nature." 4A J. Moore, Collier on Bankruptcy ¶ 70.42[2], pp. 502–504 (14th ed. 1978); see also *In re Quanta Resources Corp.*, 739 F. 2d 912, 916 (1984) (quoting same language from Collier). Respondents further observe that the section of this treatise addressing abandonment was cited in a note to an early precursor of § 554, § 4–611 of the proposed Bankruptcy Act of 1973, H. R. Doc. No. 93–137, Part II, 181, reprinted in A. Resnick & E. Wypyski, 2 Bankruptcy Reform Act of 1978: A Legislative History, Doc. No. 22 (1979). While resourceful, this argument is wholly unpersuasive.

The reference to Collier is not part of the Code's "'legislative history' in any meaningful sense of the term," *Board of*

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Governors v. *Dimension Financial Corp.*, —— U. S. ——, —— (1986) (slip op. at 10). And the proposition for which the section in Collier is cited is not the view that authority for abandonment is qualified by state police power, but instead the much less remarkable proposition that "[t]he concept of abandonment is well recognized in the case law. See 4A Collier ¶ 70.42[3]." In order to divine that the statutory power to abandon in the proposed Code was to be conditioned on compliance with state police power regulations, therefore, a Senator or Congressman would not merely have had to look at the legislative history of the precursor to the Code, but also would have had to read the several-page treatise section cited in that earlier legislative history.

Neither the three cases cited by the Court nor the attenuated reference to the since superseded version of Collier supports the inference that Congress, while writing § 554 in unqualified terms, intended to incorporate so ill-defined and uncertain an exception to the abandonment authority of the trustee. After suggesting that "if Congress intends for legislation to change the interpretation of a judicially created concept" it should do so expressly, *ante* at 6, the Court concedes that these cases "do not define for us the exact contours of the trustee's abandonment power," *ante*, at 7. The Court never identifies the source from which it draws the "exact contours" of the rule it announces today; congressional intent does not appear to be a likely candidate. Congress knew how to draft an exception covering the exercise of "certain" police powers when it wanted to. See 11 U. S. C. §§ 362(b)(4), (5) (1982 ed. and Supp. II); *supra*, at ——. It also knew how to draft a qualified abandonment provision. See § 1170(a)(2) (abandonment of railroad lines permitted only if "consistent with the public interest"). Congress' failure to so qualify § 554 indicates that it intended the relevant inquiry at an abandonment hearing to be limited to whether the property is burdensome and of inconsequential value to the estate.

I find the Court's discussion of 28 U. S. C. § 959(b) somewhat difficult to fathom. After suggesting that § 959(b) "provides additional evidence" for the self-evident proposition "that Congress did not intend for the Bankruptcy Code to preempt all state laws," *ante*, at 10, the Court concedes that the provision "does not *directly* apply to an abandonment under § 554(a) of the Bankruptcy Code," *ibid.* (emphasis added). The precise nature of its *indirect* application, however, is left unclear. Respondents contend that § 959(b) operates to bar abandonment in these cases. Assuming that temporary management or operation of a facility during liquidation is governed by § 959(b), I believe that a trustee's filing of a petition to abandon, as opposed to continued operation of a site pending a decision to abandon, does not constitute "manage[ment]" or "opera[tion]" under that provision. Not only would a contrary reading strain the language of § 959(b), cf. *In re Adelphi Hospital Corp.*, 579 F. 2d 726, 729, n. 6 (CA2 1978) *(per curiam)* (in pre-Code liquidation proceeding trustee "is in no sense a manager of an institution's operations"), it also would create an exception to the abandonment power without a shred of evidence that Congress intended one. As one commentator has noted, § 554(a) "is among the few provisions in the Bankruptcy Code that do not contain explicit exceptions." Note, 85 Colum. L. Rev. 870, 883 (1985). I would not read 28 U. S. C. § 959(b) as creating an implicit exception.

Citing *SEC* v. *United Realty & Improvement Co.*, 310 U. S. 434, 455 (1940), respondents argue that the Bankruptcy Court's equitable powers support the result reached below. I disagree. While the Bankruptcy Court is a court of equity, the Bankruptcy Code "does not authorize freewheeling consideration of every conceivable equity." *Bildisco & Bildisco*, 465 U. S., at 527. The Bankruptcy Court may not, in the exercise of its equitable powers, enforce its view of sound public policy at the expense of the interests the Code is designed to protect. In these cases, it is undisputed that the properties in question were burdensome and of inconsequential value to the estate. Forcing the trustee to expend estate assets to clean up the sites would plainly be contrary to the purposes of the Code. See *supra*, at ——.

I fully appreciate the Court's concern that abandonment may "aggravat[e] already existing dangers by halting security measures that preven[t] public entry, vandalism, and fire." *Ante*, at 4, n. 3. But in almost all cases, requiring the trustee to notify the relevant authorities before abandoning will give those authorities adequate opportunity to step in and provide needed security. As the Bankruptcy Court noted in No. 84–805: "The City and State are in a better position in every respect than either the Trustee or debtor's creditors to do what needs to be done to protect the public against the dangers posed by the PCB-contaminated facility." App. to Pet. for Cert. 73a. And requiring notice before abandonment in appropriate cases is perfectly consistent with the Code. It advances the State's interest in protecting the public health and safety, and, unlike the rather uncertain exception to the abandonment power propounded by the Court, at the same time allows for the orderly liquidation and distribution of the estate's assets. Here, of course, the trustee provided such notice and the relevant authorities were afforded an opportunity to take appropriate preventative and remedial measures.

I likewise would not exclude the possibility that there may be a far narrower condition on the abandonment power than that announced by the Court today, such as where abandonment by the trustee itself might create a genuine emergency that the trustee would be uniquely able to guard against. The United States in its brief as *amicus curiae* suggests, for example, that there are limits on the authority of a trustee to abandon dynamite sitting on a furnace in the basement of a schoolhouse. Although I know of no situations in which trustees have sought to abandon dynamite under such circumstances, the narrow exception that I would reserve surely would embrace that situation.

What the Court fails to appreciate is that respondents' interest in these cases lies not just in protecting public health and safety but also in protecting the public fisc. In No. 84–805, before undertaking cleanup efforts, New York unsuccessfully sought from the Bankruptcy Court a first lien on the Long Island City property to the extent of any expenditures it might make to bring the site into compliance with state and local law. New York did not appeal the Court's denial of a first lien, and proceeded to clean up the site (except for the contaminated subsoil). It now presses a claim for reimbursement, maintaining that the trustee should not have been allowed to abandon the site. The New Jersey Department of Environmental Protection, in No. 84–801, apparently seeks to undo the abandonment and force the trustee to expend the estate's remaining assets cleaning up the site, thereby reducing the cleanup costs that must ultimately be borne by the State.[4]

The Court states that the "abandonment power is not to be fettered by laws or regulations not reasonably calculated to protect the public health or safety from imminent and identifiable harm." *Ante* at 12, n. 11. Because the Court declines to identify those laws that its deems so "reasonably calculated," I can only speculate about its view of respondents' claim that abandonment can be conditioned on a total cleanup. One might assume, however, that since it affirms the judgments below the Court means to adopt respondents' position. The Court of Appeals, as I read their opinions in these cases, apparently would require the trustee to expend all of Quanta's available assets to clean up the sites.[5] But barring abandonment and forcing a cleanup would effectively place respondents' interest in protecting the public fisc ahead of the claims of other creditors. Congress simply did not intend that § 554 abandonment hearings would be used to establish the priority of particular claims in bankruptcy. While States retain considerable latitude to ensure that priority status is allotted to their cleanup claims, see *Ohio* v. *Kovacs*, 469 U. S., at —— (slip op. at 1) (O'CONNOR, J., concurring), I believe that the Court errs by permitting them to impose conditions on the abandonment power that Congress never contemplated. Accordingly, in each of these cases I would reverse the judgment of the Court of Appeals.

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[4] NJDEP does not contend that the estate, including any assets otherwise subject to Midlantic's secured claim, contains sufficient assets to complete the cleanup.

[5] I would think that this command qualifies, in the words of the Court, as a "conditio[n] on abandonment so onerous as to interfere with the bankruptcy adjudication itself," *ante*, at 12.

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(Slip Opinion)

ORIGINAL

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Lumber Co.*, 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

ILS

Syllabus

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EXXON CORP. ET AL. *v.* HUNT, ADMINISTRATOR OF NEW JERSEY SPILL COMPENSATION FUND, ET AL.

APPEAL FROM THE SUPREME COURT OF NEW JERSEY

No. 84–978. Argued December 9, 1985—Decided March 10, 1986

The New Jersey Spill Compensation and Control Act (Spill Act), enacted in 1977 to respond to the problem of hazardous substance release, imposes an excise tax upon major petroleum and chemical facilities within the State to finance the prevention and cleanup of oil spills and leaks of hazardous chemicals from disposal sites. The tax revenue goes into a permanent fund (Spill Fund), which may spend money not only to clean up releases of hazardous substances, but also to compensate third parties for certain economic losses sustained as a result of such releases, and to pay administrative and research costs. The federal Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), enacted in response to similar concerns, imposes an excise tax on petroleum and other specified chemicals and establishes a trust fund (Superfund) that may be used to clean up hazardous substances releases and for certain other purposes. CERCLA does not cover oil spills; nor is Superfund money available to compensate private parties for economic harms that result from hazardous substance releases. Superfund money may be used to reimburse private parties only for their cleanup activities that are expressly authorized by the Federal Government; to finance Federal or State Government expenses for short-term cleanup or for measures to achieve a permanent remedyto a particular hazardous waste problem; and to compensate those governments for damages to their natural resources. Appellant corporations, having paid the Spill Act tax, brought suit in the New Jersey Tax Court against appellees (the State and certain of its officials), seeking a tax refund and a declaratory judgment that the New Jersey tax was invalid in its entirety as being pre-empted under § 114(c) of CERCLA, which provides: "Except as provided in this chapter, no person may be required to contribute to any fund, the purpose of which is to pay

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compensation for claims for any costs of response or damages or claims which may be compensated under this subchapter." Section 114(c) also contains a saving provision stating that nothing in § 114(c) shall be interpreted to prevent a State from using general revenues for such a fund or from imposing a special tax to purchase or locate equipment or otherwise prepare for a response to hazardous substance releases. The court entered summary judgment for appellees, and the New Jersey Appellate Division affirmed. The New Jersey Supreme Court also affirmed, holding that the Spill Fund tax was not pre-empted by § 114(c) insofar as the Spill Fund "is used to compensate hazardous-waste cleanup costs and related claims that are either not covered or not actually paid under Superfund."

Held:

1. The words "costs of response or damages or claims" in § 114(c) are to be read as a unit, and the entire phrase is modified by the phrase "which may be compensated under this subchapter," thus pre-empting any special state tax fund used to reimburse either a State or a third party for cleanup expenses. An interpretation of those terms so as to include only a private party's cleanup expenses, and so as to permit state-fund expenditures for all state-government cleanup efforts is not supported by CERCLA's history or the wording of other provisions of CERCLA, particularly the saving provision of § 114(c) which, in authorizing special state taxes to pay for the State's preparations for responding to hazardous substance releases, would be redundant if the pre-emption provision did not cover direct governmental expenditures at all. Pp. 7–13.

2. Section 114(c)'s phrase "which may be compensated under this subchapter" is to be interpreted as pre-empting any state fund that is intended, in whole or in part, to pay for the same types of expenses that may be paid by Superfund, and not as covering only expenses that are actually paid by Superfund. Pp. 13–14.

3. Neither the structure nor the legislative history of CERCLA supports appellees' contention that although § 114(c) is not restricted to cases in which Superfund actually disburses money, it applies only when Superfund pays a claim or *would have* paid the claim had it not already been paid by a state fund. Remedying the Nation's toxic waste problems as effectively as possible was not the sole policy choice reflected in CERCLA. Congress' decision to enact a pre-emption provision resulted in part from its concern about the potentially adverse effects of overtaxation on the competitiveness of the American petrochemical industry. That consideration cautions against concluding that Congress would not have wanted to hinder state attempts to clean up hazardous substances in any way. Nor is there sufficient support in § 114(c)'s

language or history to accept appellees' contention that in view of the limited availability of Superfund money, only projects that have been actually approved, or are almost certain to be approved, can be termed "eligible" for Superfund financing, and then only to the extent of the approved funding. Pp. 14–17.

4. The National Contingency Plan—which CERCLA requires to be revised annually to list sites most in need of federal efforts—provides the appropriate measure of whether a given expenditure constitutes "costs of reponse or damages or claims which may be compensated" by Superfund. Since CERCLA also provides that a State must agree to pay at least 10% of the cost of any remedial action for a hazardous site within the State, such state share is not eligible for Superfund money and thus is not a cost that "may be compensated" for purposes of § 114(c). Under the above-stated principles, use of the New Jersey Spill Fund to compensate third parties for damage resulting from hazardous substance discharges, to pay personnel and equipment costs, to administer the fund, and to conduct research is beyond the scope of CERCLA, and therefore not pre-empted by § 114(c). However, use of the Spill Fund to finance state governmental cleanup (except the 10% state share of remedial costs) and to reimburse third parties for cleanup costs is pre-empted, so long as such efforts occur at sites that are eligible for Superfund financing according to the terms of the National Contingency Plan. Pp. 17–19.

97 N. J. 526, 481 A. 2d 271, affirmed in part, reversed in part, and remanded.

Marshall, J., delivered the opinion of the Court, in which Burger, C. J., and Brennan, White, Blackmun, Rehnquist, and O'Connor, JJ., joined. Stevens, J., filed a dissenting opinion. Powell, J., took no part in the consideration or decision of the case.

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D. C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

No. 84-978

EXXON CORPORATION, ET AL., APPELLANTS *v.* ROBERT HUNT, ADMINISTRATOR OF NEW JERSEY SPILL COMPENSATION FUND ET AL

ON APPEAL FROM THE SUPREME COURT OF NEW JERSEY

[March 10, 1986]

JUSTICE MARSHALL delivered the opinion of the Court.

The question for our determination is whether § 114(c) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 94 Stat. 2796, (CERCLA), 42 U. S. C. § 9614(c), pre-empts the New Jersey Spill Compensation and Control Act, N. J. Stat. Ann. §§ 58:10–23.11 to 58:10–23.11z (West 1982 and Supp. 1985) (Spill Act). We conclude that the Spill Act is pre-empted in part.

I

A

In 1977 the New Jersey Legislature enacted the Spill Act to respond to the problem of hazardous substance release. Finding that oil spills threatened the health and beauty of the State's natural resources, and that leaks of hazardous chemicals from disposal sites presented a great risk to the public, the legislature intended the Spill Act to protect the citizens and environment of New Jersey through prevention and cleanup of spills and other releases. Those efforts are financed by an excise tax levied upon major petroleum and chemical facilities within the State. The money collected goes into a permanent fund known as the "Spill Fund." The Spill Fund may spend money to clean up releases of hazardous substances, to compensate third parties for certain economic losses sustained as a result of such releases, and to pay administrative and research costs. N. J. Stat. Ann. § 58:10–23.11o (West Supp. 1985).[1]

In 1980 Congress enacted CERCLA in response to similar concerns. CERCLA imposes an excise tax on petroleum and other specified chemicals. The Act establishes a trust fund, commonly known as "Superfund," 87.5% of which is financed through the excise tax, and the remainder through general revenues. Superfund money may be used to clean up releases of hazardous substances and for certain other purposes.[2] Unlike the Spill Act, CERCLA does not include oil spills within its definition of hazardous substance releases,

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[1] The compensation for third-party economic loss is broad. The Spill Fund is strictly liable to any party that suffers direct or indirect economic damage from releases of hazardous substances, including (1) damage to any real or personal property, (2) damage to natural resources, (3) loss of income or earning capacity, in certain circumstances, (4) loss of property tax revenue by the State or a local government for one year following the discharge, and (5) interest incurred on loans to ameliorate the effects of a discharge pending reimbursement by the Spill Fund. N. J. Stat. Ann. § 58.10–23.11g (West 1982).

[2] Title 42 U. S. C. § 9611(a) provides:

"The President shall use the money in the Fund for the following purposes:

"(1) payment of governmental response costs incurred pursuant to section 9604 of this title, including costs incurred pursuant to the Intervention on the High Seas Act;

"(2) payment of any claim for necessary response costs incurred by any other person as a result of carrying out the national contingency plan established under section 1321(c) of title 33 and amended by section 9605 of this title: *Provided, however,* That such costs must be approved under said plan and certified by the responsible Federal official;

"(3) payment of any claim authorized by subsection (b) of this section [providing for reimbursement to the Federal and State Governments for damage to natural resources under their respective control] and finally decided pursuant to section 9612 of this title, including those costs set out in subsection 9612(c)(3) of this title [providing for recovery by Fund of interest, costs, and attorney's fees in action against any person liable to the claimant or to the Fund]; and nor is Superfund money available to compensate private parties for economic harms that result from discharges of hazardous substances. Rather, it seeks to facilitate government cleanup of hazardous waste discharges and prevention of future releases. There are two primary purposes for which the Superfund money may be spent—to finance "governmental response," and to pay "claims." See § 111(a) of CERCLA, 42 U. S. C. § 9611(a). Governmental response consists of "removal," or short-term cleanup, § 9601(23), and "remedial action," or measures to achieve a "permanent remedy" to a particular hazardous waste problem, § 9601(24).[3] Claims are demands for reimbursement made upon the Superfund, and also come in two types. One type of claim is a demand by "any other person" for costs incurred pursuant to the federal plan for cleanup of hazardous substances, known as the "national contingency plan." § 9611(a)(2).[4] Thus, Superfund may reimburse private parties only to the extent that their cleanup activities are expressly authorized by the Federal Government. The second type of claim is a demand by the Federal or a State government for compensation for damages to natural resources belonging to that government. § 9611(a)(3). Superfund money may not be used

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"(4) payment of costs specified under subsection (c) of this section [providing for research, restoration or replacement of natural resources, prevention of releases, equipment and overhead, and administrative costs].

"The President shall not pay for any administrative costs or expenses out of the Fund unless such costs and expenses are reasonably necessary for and incidental to the implementation of this subchapter."

[3] Section 104 of CERCLA, 42 U. S. C. § 9604, which sets out procedures for governmental response to hazardous substance releases, provides that state and local governments, as well as the Federal Government, may be delegated by the President to undertake appropriate measures and receive reimbursement from Superfund. It appears, therefore, that the term "governmental response costs" in § 9611(a)(1), see n. 2, *supra*, refers to Federal, State, and local Government.

[4] Because paragraph (1) of 42 U. S. C. § 9611(a) apparently applies to any governmental entity, see n. 3, *suprd*, the phrase "any other person" in paragraph (2) of that subsection must denote any nongovernmental entity.

to pay for injury to persons or property caused by hazardous wastes, except for payment to the Federal and State Governments for their natural resource losses.

This litigation concerns § 114(c) of CERCLA, 42 U. S. C. § 9614(c), which provides:

> "Except as provided in this chapter, no person may be required to contribute to any fund, the purpose of which is to pay compensation for claims for any costs of response or damages or claims which may be compensated under this subchapter. Nothing in this section shall preclude any State from using general revenues for such a fund, or from imposing a tax or fee upon any person or upon any substance in order to finance the purchase or prepositioning of hazardous substance response equipment or other preparations for the response to a release of hazardous substances which affects such State."

Clearly, this provision is meant to forbid the States from imposing taxes to finance certain types of funds. The issue in this case is whether the New Jersey Spill Fund is, in whole or in part, the type of fund that § 114(c) pre-empts.

B

Appellants are corporations that have paid the Spill Act tax since its inception. After unsuccessful attempts to litigate the issue in the federal courts, see *Exxon Corp.* v. *Hunt*, 683 F. 2d 69 (CA3 1982), cert. denied, 459 U. S. 1104 (1983); cf. *New Jersey* v. *United States*, 16 ERC 1846 (DC 1981) (dismissing suit brought by New Jersey seeking to have tax declared valid),[5] appellants brought suit in the New

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[5] A member of the New Jersey Legislature also brought suit against the United States seeking to have the Spill Act declared valid. The parties settled the litigation, stipulating that New Jersey could spend Spill Fund money for seven enumerated purposes, including compensation for response costs and damages that are eligible for Superfund compensation but are not actually compensated. See *Lesniak* v. *United States*, 17 ERC 1456 (NJ 1982). Appellants, of course, were not parties to that settlement.

Jersey Tax Court against New Jersey and certain of its officials (collectively New Jersey), seeking a declaratory judgment and a refund of taxes paid pursuant to the Spill Act. Appellants claimed that the New Jersey tax was invalid in its entirety under § 114(c) and the Supremacy Clause. The Tax Court entered summary judgment for New Jersey on two alternative grounds. First, the court concluded that § 114(c) does not pre-empt state funds that pay cleanup costs and other claims that are not actually compensated by Superfund. Second, even accepting Exxon's argument that § 114(c) precludes any state taxation of industry to pay for cleanup and remedial activities, the court found that there were sufficient nonpre-empted purposes to the Spill Fund to make the Fund valid in its entirety. 4 N. J. Tax 294 (1982).

The New Jersey Appellate Division affirmed, 190 N. J. Super. 131, 462 A. 2d 193 (1983), as did the New Jersey Supreme Court, 97 N. J. 526, 481 A. 2d 271 (1984). The latter court, like the Tax Court, concluded that "the Spill Fund tax . . . is not preempted by section 114(c) of Superfund insofar as Spill Fund is used to compensate hazardous-waste cleanup costs and related claims that are either not covered or not actually paid under Superfund." *Id.*, at 544, 481 A. 2d, at 281. We noted probable jurisdiction, 472 U. S. —— (1985), and we now affirm in part and reverse in part.[6]

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[6] CERCLA was a temporary experiment; by its terms, the Federal Government's authority to collect the excise tax and to appropriate general revenues for Superfund expired on September 30, 1985. 42 U. S. C. §§ 9653, 9631(b)(2). The Congress is currently considering legislation that would extend CERCLA for another five years. See S. 51, 99th Cong., 1st Sess. (1985), passed by the Senate, see Cong. Rec. S12184 (Sept. 26, 1985), and H. R. 2817, 99th Cong., 1st Sess. (1985), inserted into H. R. 2005, 99th Cong., 1st Sess. (1985), passed by the House, see Cong. Rec. H11564 (Dec. 10, 1985). As passed, both the Senate and House bills eliminate § 114(c). See S. 51, § 135; H. R. 2005, § 147. Of course, appellants' claims for a refund of taxes paid through September 30, 1985 are unaffected by the expiration of CERCLA or by any changes in the law after that date.

II

This is an express pre-emption case; appellants claim that the plain language of § 114(c) forbids state taxation of the type the Spill Act imposes. When a federal statute unambiguously precludes certain types of state legislation, we need go no further than the statutory language to determine whether the state statute is pre-empted. *Aloha Airlines, Inc.* v. *Director of Taxation*, 464 U. S. 7, 12 (1983).

Section 114(c), unfortunately, is not a model of legislative draftsmanship. The critical language, "no person may be required to contribute to any fund, the purpose of which is to pay compensation for claims for any costs of response or damages or claims which may be compensated under this subchapter," is at best inartful and at worst redundant. As just one example, it is not clear whether "which may be compensated under this subchapter" modifies only the word "claims" which immediately precedes it, or the entire phrase "any costs of response or damages or claims." Because the terms "claims," "response," and "damages" have specific, technical definitions under CERCLA, the way the sentence is parsed may have a significant effect on its meaning. Finally, § 114(c) by itself does not provide a method for determining whether a particular expenditure "may be compensated" by Superfund. That determination, therefore, necessitates reference to the remainder of CERCLA.

III

Our task, then, must proceed in three parts. First, we must determine what class of expenses is encompassed within the phrase "costs of response or damages or claims." Then, because at least some of those expenses are covered by § 114(c) only to the extent that they "may be compensated" by Superfund, we must determine the meaning of that phrase as well. Finally, if we find an overlap between § 114(c)'s prohibitions and the Spill Act's provisions, we must hold the latter pre-empted.

A

Both parties agree as to the first question. Each concludes that the words "costs of response or damages or claims" are to be read as a unit, and the entire phrase is modified by the phrase "which may be compensated under this subchapter." However, the Solicitor General, appearing on behalf of the United States as *amicus curiae*, adopts a contrary position. He contends that § 114(c) should be read to prohibit funds whose purpose is to pay "compensation for [a] claims for any costs of response or damages[,] or [b] claims which may be compensated under this subchapter." Under the Solicitor General's view, therefore, any expense that fits CERLCA's definitions of a "claim" for "costs of response" or "damages" may not be paid by a state fund supported by special taxes, whether or not that expenditure "may" be paid by Superfund.[7] Because "costs of response" covers essentially the entire spectrum of cleanup expenses, see 42 U. S. C. § 9604, the Solicitor General's reading of the pre-emptive scope of § 114(c) might seem very broad at first reading.

The wide sweep of the Solicitor General's position, however, is tempered considerably by his interpretation of the term "claim." CERCLA defines a "claim" as "a demand in writing for a sum certain." § 9601(4). Under the Solicitor General's view, only a private party's demand upon a state fund or Superfund for reimbursement for that party's own cleanup expenses constitutes a "claim." Any State or Federal Government use of a special fund is merely a governmental expenditure, and not the payment of a "claim." Because each of the two clauses created by the Solicitor

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[7] An example of a "cost of response" that would not be eligible for Superfund compensation would be the cost of a private party's cleanup efforts if that party did not receive prior authorization from the Federal Government or its agent, see 42 U. S. C. § 9611(a)(2). Under the Solicitor General's reading of § 114(c), a state fund could not reimburse those costs even though it is clear that they would not be eligible for Superfund money.

General's parsing of § 114(c) begins with the word "claims," he argues, that section does not prohibit *any* state fund expenditures for a state government's own cleanup efforts. It prohibits only expenditures to reimburse private parties. Were we to accept the Solicitor General's reading of § 114(c), therefore, New Jersey could freely tax appellants to pay for its own cleanup costs, even if Superfund might otherwise pay those costs. New Jersey could not, however, tax appellants to pay for third-party cleanup costs, whether or not Superfund might bear those costs. Similarly, New Jersey could not use the Spill Fund to pay for any party's "damages," defined by CERCLA to mean loss of natural resources, even though Superfund covers only "damages" suffered by governments.

The United States is not a party, of course, and all parties before us disagree with the Solicitor General's reading of the statute. However, the Solicitor General's view has considerable logical force, and assessing it will prove helpful in evaluating the parties' positions on issues as to which they disagree. Although we ultimately reject the Solicitor General's position, therefore, we find it helpful to analyze it in some detail.

One problem with the Solicitor General's view is that the distinction between a government's own cleanup costs, on the one hand, and "claims," on the other, has not been so consistent throughout CERCLA's history as the Solicitor General suggests. The 96th Congress fully considered three major hazardous substance response bills—H. R. 85, H. R. 7020, and S. 1480—in addition to the Carter Administration bill, S. 1341, which died in committee. See 1 The Environmental Law Institute, Superfund: A Legislative History xiii (1983) (hereafter Leg. Hist.).[8] The earliest of these, H. R. 85, had a pre-emption provision resembling § 114(c). Section 110 of the bill as passed by the House provided: "no person may be required to contribute to any fund, the purpose of which is to compensate for a loss which is a compensable damage" under that bill.[9]

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[8] Bill H. R. 85, 96th Cong., 1st Sess., was introduced on January 15, 1979 by Representative Biaggi. After consideration in committee, the bill was reported to the full House, see H. R. Rep. No. 96-172 (1979), but it ran into opposition from the oil and chemical industries. A substitute bill,

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introduced by Representative Breaux as an amendment to H. R. 85, was considered and passed by the full House. 126 Cong. Rec. 26391 (1980). The bill as passed created two funds financed from taxes on pretroleum and chemical feedstocks. One fund was to provide compensation for oil spills and the other for hazardous chemical spills in navigable waters; the bill did not cover hazardous substance releases on land. The bill entitled governments and individuals to recover damages for cleanup costs and certain economic losses, and imposed strict liability on owners and operators of vessels and other facilities.

Representative Florio introduced H. R. 7020, 96th Cong., 2d Sess., on April 2, 1980. The bill was reported out of committee, see H. R. Rep. No. 96–1016 (1980), and enacted by the House, 126 Cong. Rec. 26799 (1980). The bill created a fund financed from a tax on oil and chemicals and from general revenues. The fund was to support government response to releases of hazardous substances, including oil, from inactive hazardous waste sites; it did not cover spills in navigable waters, nor did it provide for compensation for economic losses.

The most ambitious of the bills, S. 1480, 96th Cong., 1st Sess., was introduced by Senators Culver, Muskie, Stafford, Chafee, Randolph, and Moynihan on July 11, 1979. It was favorably reported, see S. Rep. No. 96–848 (1980). As reported, the bill provided for a $4 billion fund from general revenues and fees on petroleum and chemicals, and for strict liability for a broad range of persons responsible for releases of hazardous chemicals (not including oil). The liability and compensation provisions covered cleanup costs and a variety of private damages, including medical expenses.

As all three bills reached the Senate, S. 1480 was attacked as too comprehensive and H. R. 85 and H. R. 7020 as too weak. Eventually the Senate passed a substitute bill, see *infra*, at 11, as an amendment to H. R. 7020. The new H. R. 7020 was enacted by both Houses, and signed into law on December 11, 1980. Pub. L. 96–510, 94 Stat. 2767. See 1 Leg. Hist. xiii–xxi; see also Senate Committee on Environment and Public Works, Legislative History of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (Superfund), (Comm. Print 1983); Grad, A Legislative History of the Comprehensive Environmental Response, Compensation and Liability ("Superfund") Act of 1980, 8 Colum. J. Env. L. 1 (1982).

The Solicitor General argues that § 110 had a purpose similar to that which he finds in § 114(c).[10] The sort of loss contemplated by the quoted language, he contends, is a loss suffered by nongovernmental entities, and not a state expenditure. This argument, however, misperceives the overall structure of H. R. 85. That bill defined compensable damages broadly, to include cleanup costs as well as injury to persons or property. Any "United States claimant" could assert a claim for these compensable damages. Significantly, a United States claimant was defined as "any person residing in the United States, the Government of the United States or an agency thereof, or the government of a State or a political subdivision thereof, who asserts a claim." *Id.* § 101(p). Thus, under H. R. 85 a state government would clearly assert a "claim" for its own cleanup expenses.[11]

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[9] As discussed in n. 8, *supra*, H. R. 85 as passed by the House provided for two funds, one to cover oil spills and the other to cover hazardous chemical spills. Section 110 applied to the oil spill fund only. Section 302 of H. R. 85 applied to the chemical spill fund, and is worded identically to § 110. We will hereafter use "§ 110" to refer to both pre-emption provisions.

[10] The Solicitor General relies on language in the House Report on H. R. 85 and in the debates to the effect that the pre-emption provision did not prevent a State from collecting taxes to pay for costs that are not "compensable damages" as defined in that bill. See Brief for United States as *Amicus Curiae* 13–15. However, as the Solicitor General misperceives the broad scope of the term "compensable damages" in H. R. 85, the use of that term in the legislative history of § 110 does not advance his argument.

[11] Bill H. R. 85, unlike CERCLA, did not provide that the President would enter into contracts with a state government under which the latter would undertake to respond to a release on behalf of the President, see 42 U. S. C. § 9604(d). Nor did it give the President special authority to respond to releases, as does CERCLA § 104. It therefore appears that H. R. 85 put both the Federal Government and the affected state government in a position closely analogous to that of a nongovernmental claimant, so far as their ability to seek compensation from the fund for costs of response to an oil spill were concerned. That fact provides further support for the argument that state governments were intended to be "claimants" under H. R. 85.

Those expenses would constitute "compensable damages," and § 110 would therefore pre-empt the creation of a special state fund to pay such "claims."

Nor do CERCLA's other predecessors support the Solicitor General's interpretation. Bill S. 1341, like H. R. 85, provided for claims by governments and had a pre-emption provision similar to § 110.[12] Bill H. R. 7020, as first passed by the House, contained no pre-emption provision. Bill S. 1480 was the most far-reaching of the bills considered, and the first to contemplate a fund of the magnitude of Superfund. As reported out of committee, it contained no pre-emption provision analogous to § 114(c).

After S. 1480 ran into opposition, the Senate considered two compromise bills intended to be "a combination of the best of [H. R. 85, H. R. 7020, and S. 1480]." 126 Cong. Rec. 30935 (1980) (remarks of Sen. Stafford). The second of these, introduced by Senators Stafford and Randolph, eventually became CERCLA. Only with the Stafford-Randolph substitute bill did the exact language of § 114(c) come into being. Given the remarkable similarity between a debate between Senators Bradley and Randolph on the meaning of § 114(c) and a debate between Congressmen Florio and Biaggi on the meaning of H. R. 85's pre-emption provision,[13] it is unlikely that the Senate considered the two provisions to differ substantially. The substitute bill was prepared and passed in considerable haste, and we are reluctant to conclude that Congress intended to adopt a wholly new approach to pre-emption of state funds by the slight changes in language between § 110 of H. R. 85 and § 114(c) of CERCLA.

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[12] Section 607(b)(1) of S. 1341, 96th Cong., 1st Sess. (1979), provided that a "claim" for removal costs could be asserted "(A) by any agency of the United States Government, [and] (B) by any State, with respect to reimbursements allowed under the system established in the National Contingency Plan." "United States claimant" was defined in exactly the same way as it was in H. R. 85. See S. 1341, § 601(mm). The pre-emption provision, § 612(a), provided that no court action could be maintained to recover for response costs or damages "a claim for which may be asserted under this title," and that "no person may be required to contribute to any fund, the purpose of which is to pay compensation for such a loss."

[13] Compare 126 Cong. Rec. 30949 (1980) (remarks of Sen. Bradley and Sen. Randolph), with 126 Cong. Rec. 26197–26198 (1980) (remarks of Rep. Florio and Rep. Biaggi).

A second reason for rejecting the Solicitor General's argument proceeds from the wording of § 114(b). That section provides: "Any person who receives compensation for removal costs or damages or claims pursuant to this chapter shall be precluded from recovering compensation" for the same expenses under any other state or federal law. We consider the similarity between § 114(b)'s phrase "removal costs or damages or claims" and § 114(c)'s phrase "costs of response or damages or claims" to suggest that Congress intended for the three terms to be read as a unit.[14] When read in conjunction with § 111(a), which provides that Superfund money may be spent on payment of governmental response costs, natural resource damages, and third party cleanup claims, it seems likely that Congress intended the phrase "removal costs or damages or claims" to provide a shorthand for the authorized uses of Superfund. This strongly undercuts the Solicitor General's approach, because it suggests that Congress envisioned state funds paying "claims" for *all* of the authorized uses of Superfund, including state cleanup costs.

A final reason for so concluding derives from the saving provision of § 114(c). The section provides that nothing in it shall be interpreted to prevent a State from imposing a special tax to purchase or preposition equipment or otherwise prepare for a quick response to hazardous substance releases. If the pre-emption provision does not cover direct governmental expenditures at all, as the Solicitor General contends, then that saving provision is redundant. On the balance, then, we conclude that the use of the term "compensation for claims" in § 114(c) represents an instance of inartful drafting rather than the intentional drawing of a subtle distinction.

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[14] Moreover, if the phrase is not to be read as a unit, but split, as the Solicitor General contends, into "claims for any costs of response or damages" and "claims which may be compensated under this subchapter," the latter phrase becomes surplusage. Under the Solicitor General's view, the only two situations that can result in a "claim" under CERCLA are first, when a third party seeks reimbursement for its "costs of response," and second, when a government seeks "damages." See 42 U. S. C. §§ 9611(a)(2), (3). Both situations, however, are already covered in the first phrase, rendering the latter superfluous.

B

Having adopted the parties' view of the interpretation of "costs of response or damages or claims," we must now determine the proper interpretation of the phrase "which may be compensated under this subchapter." The New Jersey Supreme Court read that language very narrowly, concluding that it covered only expenses that are actually paid by Superfund. Appellants, adopting a broader interpretation of "may be compensated," contend that § 114(c) pre-empts any fund that is intended, in whole or in part, to pay for the same types of expenses that may be paid by Superfund.

Appellants challenge the state court's holding on several grounds. First, they contend, it is highly unlikely that a State would choose to pay such double compensation, even in the absence of an express prohibition. Second, subsection (b) of § 114 provides that any person who receives compensation under Superfund "shall be precluded from recovering compensation for the same removal costs or damages or claims pursuant to any other State or Federal law." The New Jersey Supreme Court's interpretation of § 114(c), therefore, makes that section redundant. Appellants rely most heavily, however, on the literal meaning of the phrase "may be compensated." They contend that the New Jersey courts have violated the plain meaning of the statute by reading the phrase to mean, in effect, "is actually compensated."

We find these arguments persuasive. Congress has already banned double compensation in § 114(b), and there is accordingly no reason to read "may be compensated" to mean "is compensated." The contrary view adopted by the New Jersey Supreme Court renders the first sentence of § 114(c) surplusage. The language of § 114(c) permitting the States to use general revenues for such a fund would also be meaningless under such a narrow reading.

C

Nevertheless, New Jersey contends that the decision below, with one minor modification, is correct. New Jersey concedes that § 114(c) is not restricted to cases in which Superfund actually disburses money. New Jersey argues, however, that § 114(c) applies only when Superfund pays a claim or *would have* paid the claim had it not already been paid by the state fund. It contends that the structure and legislative history of CERCLA support its argument. We will examine each in turn.

New Jersey emphasizes the limited scope of CERCLA. The federal statute does not cover several broad areas—for example, payment for nongovernmental property losses and costs arising from oil spills—that are important aspects of hazardous substance control, and are covered by New Jersey's Spill Act. Moreover, Congress was well aware that the funding level of Superfund was and is insufficient to clean up more than a few of the most dangerous hazardous waste disposal sites. These facts, New Jersey claims, suggest that Congress recognized that Superfund would not solve all of the Nation's hazardous waste problems, and that the States would have to continue their own efforts. It follows that Congress did not intend to pre-empt state taxation to pay for cleanup efforts that the Federal Government was unable to undertake because of unavailability of funds, even though such efforts were of the type that are eligible for Superfund money.

That Congress has not chosen the most comprehensive or efficient method of attacking the problem of hazardous substance discharges, however, is not reason to depart from the language of the statute. Moreover, while we agree with New Jersey that the overall purpose of a statute is a useful referent when trying to decipher ambiguous statutory language, remedying the Nation's toxic waste problems as effectively as possible was not the sole policy choice reflected in CERCLA. Previous attempts to enact a comprehensive hazardous substance response bill were defeated in part because of opposition by the affected industries. It seems clear that the decision to enact a pre-emption provision resulted in part from Congress' concern about the potentially adverse effects of overtaxation on the competitiveness of the American petrochemical industry.[15] That consideration, whether wise or not, cautions against our concluding that Congress would not have wanted to hinder state attempts to clean up hazardous substances in any way.

New Jersey contends, however, that its reading of § 114(c) does no violence to the statutory language. It argues that we must look not only to the provisions of CERCLA, but also to the amount of money available in Superfund, before deciding whether a particular expense "may be compensated" by Superfund. New Jersey argues that the availability of Superfund money is sufficiently low, as a practical matter, that only projects that have been actually approved, or are almost certain to be approved, can be termed "eligible" for Superfund financing, and then only to the extent of the approved funding.

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[15] See, *e. g.*, H. R. Rep. No. 96-172, p. 22 (1979) (accompanying H. R. 85) ("The increasing distress over the development of a multitude of State statutes related to liability and compensation for damage from oil spills, felt by those engaged in the national and international movement and storage of petroleum and petroleum products, was again articulated. It was argued that, if this continues, they will be severely hampered in their ability to conduct their operations in a manner that is economically sound and of reasonable cost to the consumer of oil"); see also 42 U. S. C. § 9651(a)(1)(F) (requiring President to report to Congress on effect of Superfund tax on "the Nation's balance of trade with other countries").

We cannot agree. To say that the only expenses that "may be compensated" are those that *are* compensated twists both language and logic further than we are willing to go. Had that been Congress' intent, it surely would have said so in plainer terms than those of § 114(c).

Comparisons with the prior bills reinforces our reading of the statute. As previously discussed, § 114(c) is derived from the pre-emption provision of H. R. 85. Section 110 of that bill pre-empted state funds whose purpose was "to compensate for a loss which is a compensable damage" under the bill. This language is not ambiguous; it clearly covers any "compensable" loss, whether or not the claimant actually receives compensation from the federal fund. Bill S. 1341 was the only other bill to contain a pre-emption provision covering state funds, prior to the eleventh-hour Stafford-Randolph substitute bill. That provision also unambiguously covers any "compensable" loss.

We also fail to find sufficient support for New Jersey's position in the sparse legislative history of the Stafford-Randolph substitute bill that became CERCLA. New Jersey relies on a floor debate between Senators Bradley and Randolph on § 114(c). New Jersey is correct in arguing that some statements in that debate imply that state fund money could be used for any expense not actually paid by Superfund.[16] In view of the haste with which the bill was considered, and the ambiguities and inaccuracies included in the debate between Senators Bradley and Randolph,[17] we decline to attach any great significance to those statements. Moreover, as we have previously mentioned, the fact that this "debate" was essentially a re-enactment of the Florio-Biaggi debate over H. R. 85's pre-emption provision implies that the Senators involved did not consider the two provisions to differ. We reject New Jersey's reading of § 114(c).

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[16] See, *e. g.*, 126 Cong. Rec. 30949 (1980):

"Mr. RANDOLPH. . . . Any damage not reimbursed by this bill fund may similarly be the proper subject of a State fund if a State so chooses to construct its fund.

. . . . .

"Mr. BRADLEY. And am I also correct in noting that State funds are preempted only for efforts which are in fact paid for by the Federal fund and that there would be no preemption for efforts which are eligible for Federal funds but for which there is no reimbursement?

"Mr. RANDOLPH. That is correct."

IV

Having decided that "may be compensated" should be given its ordinary meaning, we must define the category of expenses that may be compensated by Superfund. Fortunately, CERCLA itself furnishes an appropriate test. Section 105(8)(B) of CERCLA, 42 U. S. C. § 9605(8)(B), requires the President to revise the National Contingency Plan (NCP) to reflect CERCLA's provisions. As part of that revision, the President must create and revise annually a list of sites most in need of federal efforts, now known as the National Priorities List.[18] The NCP currently specifies that removal, or immediate cleanup, will be financed by Superfund only in emergency situations, see 40 CFR § 300.65 (1985). Remedial action will be financed only for sites on the National Priorities List, *id.*, § 300.68(a). Finally, the Environmental Protection Agency, pursuant to the NCP, has proposed criteria for the use of Superfund money for natural resource claims. See 50 Fed. Reg. 9593 (1985). The NCP, therefore, provides criteria that determine what expenses, at which sites, will be eligible for Superfund money. We therefore conclude that the NCP provides the appropriate measure of whether a given expenditure constitutes "costs of response or damages or claims which may be compensated" by Superfund.

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[17] Taken, in part, word-for-word from the Florio-Biaggi debate, the Bradley-Randolph debate contains a number of statements that might apply to H. R. 85 but could not apply to CERCLA. Senator Bradley used the phrase "compensable damages" from H. R. 85, § 110, which nowhere appears in CERCLA § 114(c). Senator Bradley also referred to "the Secretary" in his questioning. While the hazardous substance program of H. R. 85 was under the control of the Secretary of Transportation, see § 101(a) of that bill as enacted, CERCLA's requirements are addressed to the Administrator of the Environmental Protection Agency and to the President. Finally, Senator Randolph stated that the pre-emption provision would take effect 180 days after passage of the bill—a provision that does not appear in CERCLA.

[18] The National Priorities List is set out at 40 CFR pt. 300, App. B. (1985).

CERCLA also provides that a State must agree to pay at least 10% of the cost of any remedial action for a hazardous waste site within the State. 42 U. S. C. § 9604(c)(3)(C). This state share is, by definition, not eligible for Superfund money. We therefore conclude that the 10% state share is not a cost that "may be compensated" by Superfund.

To the extent that appellants argue that § 114(c) covers any cleanup or remedial expenses, whether or not eligible for Superfund compensation, we must reject their position. While we have acknowledged Congress' desire to spare the involved industries from excessive taxation, we must assume that Congress meant the words "which may be compensated under this subchapter" to have some meaning. The only plausible explanation for the use of that phrase is that Congress intended to prohibit state funds that covered Superfund-eligible expenses. Once again, we decline to second-guess the methods Congress used to achieve its purposes.

Our remaining task is to determine whether the "purpose" of the Spill Fund is to pay costs that we have found to fall within the scope of pre-emption. As we have explained above, the Spill Fund may be used for six purposes: (1) to finance governmental cleanup of hazardous waste sites; (2) to reimburse third parties for cleanup costs; (3) to compensate third parties for damage resulting from hazardous substance discharges; (4) to pay personnel and equipment costs; (5) to administer the fund itself; and (6) to conduct research. Of these, the latter four are clearly beyond the scope of

CERCLA, and are therefore not covered by § 114(c). The first two are within the scope of CERCLA, except to the extent that they are intended to provide the 10% state share of remedial costs. Those parts of the statute that permit Spill Fund expenditures beyond this state share for remedial costs for sites on the National Priority List, or for removal costs that are eligible for Superfund compensation under the terms of the NCP, are pre-empted by § 114(c).

New Jersey argues, finally, that after the enactment of CERCLA, or at least after the publication of the National Priorities List, all Spill Fund expenditures for purposes (1) and (2) above have been for non-Superfund eligible sites, and therefore are for nonpre-empted purposes. To the extent that the Spill Act permits taxation to support pre-empted expenditures, however, it cannot stand. State legislation is invalid "to the extent that it actually conflicts with federal law," *Pacific Gas & Electric Co.* v. *Energy Resources Commission*, 461 U. S. 190, 204 (1983), and such a conflict has been demonstrated in this case. We leave to the New Jersey Supreme Court the state-law question whether, or to what extent, the nonpre-empted provisions of the statute are severable from the pre-empted provisions. See *Exxon Corp.* v. *Eagerton*, 462 U. S. 176, 196–197 (1983). We decline the dissent's invitation to hold that the Spill Act is valid in its entirety because a substantial portion of its purposes are permissible. Such a holding would be an open invitation to the States to flout federal law by including valid provisions within clearly invalid statutes.

V

To the extent that the New Jersey Supreme Court held that the Spill Act could constitutionally impose a tax to support expenditures for purposes that we have identified above as nonpre-empted, that court's judgment is affirmed. To the extent it held that Spill Act could constitutionally impose a tax to support expenditures for purposes that we have identified as pre-empted, its judgment is reversed and the case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

JUSTICE POWELL took no part in the consideration or decision of this case.

SUPREME COURT OF THE UNITED STATES

No. 84-978

EXXON CORPORATION, ET AL., APPELLANTS *v.* ROBERT HUNT, ADMINISTRATOR OF NEW JERSEY SPILL COMPENSATION FUND, ET AL.

ON APPEAL FROM THE SUPREME COURT OF NEW JERSEY

[March 10, 1986]

JUSTICE STEVENS, dissenting.

The purposes of the "Spill Fund" Act passed by the New Jersey Legislature in 1977,[1] and the "Superfund" legislation enacted by the Congress of the United States in 1980[2] overlap partially but not entirely. In the area of overlap, both statutes create funds to defray the costs of responding to environmental damage caused by the disposal of certain hazardous substances. Even in this area, however, the state and federal funds are not identical, for § 114(c) of the federal statute provides that no person may be required to contribute to any state fund if "the purpose" of the fund is to pay "compensation for claims for any costs of response or damages or claims which may be compensated under" the federal fund.[3] The question presented by this case is whether the

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[1] New Jersey Spill Compensation and Control Act (Spill Fund), N. J. Stat. Ann. §§ 58:10-23.11 to -23.11z (West 1982 and Supp. 1985).

[2] Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (Superfund or CERCLA), 94 Stat. 2767, codified at 42 U. S. C. §§ 9601-9657.

[3] Section 114(c) of Superfund states in full:

"Except as provided in this Act, no person may be required to contribute to any fund, *the purpose* of which is to pay compensation for claims for any costs of response or damages or claims which may be compensated under this title. Nothing in this section shall preclude any State from using general revenues for such a fund, or from imposing a tax or fee upon any person or upon any substance in order to finance the purchase or preposiwords "the purpose" should be construed to mean "one of the purposes."

I

Both parties agree that the New Jersey Spill Fund was created to serve multiple purposes, and that at least some of these purposes are not expressly described in § 114(c).[4] Moreover, even if the bulk of the moneys in the Spill Fund

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tioning of hazardous substance response equipment or other preparations for the response to a release of hazardous substances which affects such State." 94 Stat. 2796, 42 U. S. C. § 9614(c) (emphasis added).

[4] As appellants concede, the New Jersey Spill Fund "has subsidiary purposes that do not duplicate those of CERCLA." Brief for Appellants 22, n. 24. For example, while Spill Fund moneys may be used to pay for petroleum and crude oil spills, N. J. Stat. Ann. § 58:10-23.11b(k) (West Supp. 1985), Superfund expressly excludes such pollutants from its definition of "hazardous substances," § 101(14), 94 Stat. 2769, 42 U. S. C. § 9601(14). In addition, New Jersey's Spill Fund authorizes payments for income or property value losses caused by damage resulting from a discharge of hazardous substances, and covers the cost of restoration or replacement of natural resources damaged or destroyed by a discharge. N. J. Stat. Ann. § 58:10-23.11g(a) (West 1982). In contrast, the federal Superfund provides limited damages coverage in relation to natural resources, and authorizes such compensation only if the release occurred after December 11, 1980, and only if the claimants are the United States or a State. §§ 107(a)(4)(A), 107(f), 111(c)(2), 111(d)(1), 94 Stat. 2781, 2783, 2789-2790, 42 U. S. C. §§ 9607(a)(4)(A), 9607(f), 9611(c)(2), 9611(d)(1). Additional expenditures authorized by the state Spill Fund, but not by its federal counterpart, include (1) the purchase and prepositioning of equipment to respond to release of hazardous substances, compare N. J. Stat. Ann. § 58:10-23.11o(4) (West Supp. 1985), with § 114(c), 94 Stat. 2796, 42 U. S. C. § 9614(c); (2) expenses related to administration of the state Spill Fund, see N. J. Stat. Ann. § 58:10-23.11o(4); and (3) research concerning pollution and cleanup techniques, including ocean pollution, see § 58:10-23.11o(3), (5). The Spill Fund statute is also authorized to pay the 10% state share "of the costs of the remedial action, including all future maintenance" required in order to qualify for federal funding which is not compensated by Superfund, § 104(c)(3), 94 Stat. 2775-2776, 42 U. S. C. § 9604(c)(3). See N. J. Stat. Ann. § 58:10-23.11o(1)-(2) (West Supp. 1985). Appellants argued in state court that taxes for this purpose contravene § 114(c).

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have to date been expended in furtherance of purposes served by the federal Superfund, there is no reason to believe that the separate purposes are pretextual or illegitimate, or that in the future New Jersey will not use its Spill Fund to meet an ecological threat, such as an oil spill, for which Superfund makes no provision. See Tr. in Nos. SC 319A–81 & SC 303A–81, p. 21 (N. J. Tax Court).

These concededly legitimate state purposes are, in my view, sufficient to validate the tax supporting New Jersey's Spill Fund. First, § 114(c) literally preempts only taxes to support state funds for which "the purpose" is to compensate for claims compensable under Superfund. In accordance with this language, contributions to state funds would be preempted only if their sole purpose—or perhaps their only nontrivial purpose—was to compensate for claims covered by Superfund. Unless Congress intended to forbid further contributions to state funds merely because they have not expended "sufficient" moneys on legitimate state objectives (whatever that threshold amount should be), New Jersey's Spill Fund unquestionably escapes the preemptive sweep of § 114(c).

If this purely literal reading of § 114(c) resulted in manifest injustice, or were plainly at war with the probable intent of Congress, I would reject it. But such a reading is consistent with the sparse legislative history that has been called to our attention.[5] In the debate on the Senate floor, New Jersey

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[5] The explanation for the absence of committee reports and for the brief remarks on the floor lies in the fact that the compromise legislation that became Superfund was introduced as a floor amendment in the Senate in the waning days of the lame duck session of the 96th Congress. The lineal ancestor of Superfund, S. 1480, was reported out of committee on November 18, 1980—after the national elections had changed the political complexion by assuring the Republicans control of the Presidency and of the Senate in 1981. In the aftermath of the November elections, S. 1480, along with three other bills, became the subject of an eleventh-hour compromise forged primarily in the Senate. The original provision in S. 1480

Senator Bradley pointed out that his State had enacted a "Spill Compensation Fund" supported by "a tax applied to transfers of petroleum and a tax on nonpetroleum hazardous substances." 126 Cong. Rec. 30949 (1980), reprinted in Senate Committee on Environment and Public Works, A Legislative History of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (Superfund), 97th Cong., 2d Sess., 731 (Comm. Print 1983) (hereinafter 1 Leg. Hist.). Acknowledging industry's fear that it might be forced to bear a "double tax," *ibid.*, the Senator propounded a series of questions to Senator Randolph of West Virginia, the bill's sponsor in the Senate, to clarify the scope of § 114(c). This colloquy, as I read it, is generally in keeping with preemption of nothing more than state taxation to support funds for which "the purpose" is to compensate for claims covered by Superfund:

> "Mr. BRADLEY.
>
> . . . . .
>
> "Am I correct in understanding that it is the purpose of this legislation [§ 114(c)] to prohibit States from requiring any person to contribute to a fund *for the purpose* of reimbursing claims already provided for in this legislation?
>
> "Mr. RANDOLPH. Yes, that is the clear intent. The purpose is to prohibit States from creating *duplicate funds* to pay damage compensable under this bill.
>
> "Mr. BRADLEY. However, there is *no such preemption* of a State's ability to collect such taxes or fees for *other costs* associated with releases that are not compensable damages as defined in this legislation.
>
> "Mr. RANDOLPH. The Senator is correct.
>
> . . . . .
>
> "Nothing in the language or intent of this bill would prohibit a State from using its fund for the purposes you

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for a $4.1 billion fund was dramatically reduced to $1.6 billion and, of importance to our inquiry, § 114(c) was added.

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have inquired about. The purpose of this legislation is simply to preempt *double taxation* of the substances enumerated in the bill *for the purposes* of compensation of the covered damage. . . .

"*Any damage not reimbursed* by this bill fund may similarly be the proper *subject* of a State fund if a State so chooses to construct its fund. . . .

. . . . .

". . . What this bill does is prohibit a State from requiring any person to contribute to any fund if *the purpose* of that fund is to compensate for a claim paid for under the provisions of this bill. Thus the State cannot receive a fee or a tax on a substance if that fee or tax is to go into a fund *and the fund is for the purpose* of paying [compensable] claims.

"Putting it simply, this is a prohibition against *double taxation for the same purposes. It [does] not . . . prohibit a State from imposing fees or taxes for other purposes* . . . .

"In summary, Mr. President, this preemption provision is narrow in scope and limited to the particular purpose of preventing double taxation." *Id.*, at 30949 (emphasis added), reprinted in 1 Leg. Hist. 731–733.[6]

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[6] I recognize that some language in this colloquy may be read to imply that § 114(c) preempts only those state funds whose purpose is to compensate for claims actually paid for by Superfund. See 126 Cong. Rec. 30949 (1980) (remarks of Sen. Bradley and Sen. Randolph), reprinted in 1 Leg. Hist. 731–732. See also 97 N. J. 526, 536–544, 481 A. 2d 271, 276–281 (1984). I agree with the Court that this interpretation conflicts with the "may be compensated" language of § 114(c), would trivialize it by rendering only actual conflicts preempted, and would render superfluous the proviso to § 114(c) that States may use "general revenues for such a fund" to pay "costs of response or damages . . . which may be compensated" under Superfund. See *ante*, at 13–14. Besides, it seems odd to suppose that States would choose to compensate claims already redressed by federal funds. In addition to these deficiencies, the colloquy inaccurately refers to a 180-day grace period before preemption would take effect and to compensation for damage caused by oil spills. See *id.*, at 17. In light of the haste with which this legislation was passed, and the consequent inaccura-

The legislation passed by the Senate was introduced in the House of Representatives by Representative Florio of New Jersey, whose brief remarks on the floor are likewise consistent with construing § 114(c) to preempt taxation to support state imitations of Superfund:

> "Regarding the preemption language contained in these amendments, I would point out that some States, including my own State of New Jersey, have successful spill funds and that while States may not create *duplicate funds* to pay damages compensable under this bill, there is *no preemption* of the State's ability to collect taxes on fees for *other costs* associated with releases that are *not compensable damages* as defined in this legislation.
>
> ". . . Putting it simply, this is a prohibition against *double taxation for the same purposes*." 126 Cong. Rec. 31965 (1980) (emphasis added), reprinted in part in 1 Leg. Hist. 780.

As I see it, if Congress had intended to forbid any further contributions to the New Jersey Spill Fund—the existence of which it was made acutely aware—it surely could have expressed that intent in less ambiguous language than is found in § 114(c). Indeed, if that had been its purpose, I would expect it to be revealed either in a committee report or in some unequivocal comment during the debates on the legislation. I have found no such legislative history. In my opinion, we should not presume preemption unless Congress clearly identifies its intent to curtail the lawmaking power of a sovereign State, either by careful draftsmanship of its preemptive command or by necessary implication based on the scope of its entire regulatory program.[7] The language of § 114(c) is sim-

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cies of some of the remarks regarding the details of the legislation, I consider the remarks on the floor only at a high level of generality.

[7] See *Chicago & N. W. Transp. Co.* v. *Kalo Brick & Tile Co.*, 450 U. S. 311, 317 (1981) ("Pre-emption of state law by federal statute or regulation is not favored 'in the absence of persuasive reasons—either that the nature

ply too opaque to support the broad prohibition that petitioners ask us to find in it.

II

For the foregoing reasons, the New Jersey Spill Fund tax is not a "contribut[ion]" to a fund "the purpose of which is to pay compensation for claims . . . which may be compensated under" Superfund. Because there exist several legitimate purposes for which New Jersey may expend funds, "the purpose" of the State Spill Fund does not duplicate the purpose of Superfund, and the tax levied to support it is to that extent unquestionably valid under § 114(c). Moreover, while the Spill Fund is by statute available (and has been used) for the purpose described in § 114(c), the State Fund's compensation for claims covered by its federal counterpart does not entitle appellants to a *pro tanto* refund of taxes on a theory that the Spill Fund is "partially preempted." The unqualified language of § 114(c) either forbids all contributions to the Fund or it forbids none; it affords no basis for objecting to a tax for the concededly legitimate state purposes identified earlier, see n. 4, *supra*.

But since the Court concludes that the Spill Act is "preempted in part," *ante*, at 1; accord, *id.*, at 19, it must confront the difficult question of relief. In keeping with its "partial preemption" analysis, the Court should advise the New Jersey courts how they should calculate the partial refund of taxes to which appellants are presumably entitled on remand. For example, must appellants be refunded the percentage of Spill Act taxes expended on Superfund-compensable claims in the tax years in question, or may the State reduce their refund by imputing an average annual cost for the clean-up of oil spills, which are one of the contingencies against which the Spill Fund was intended to accumulate reserves but which has not yet occurred?

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of the regulated subject matter permits no other conclusion, or that the Congress has unmistakably so ordained.'" (quoting *Florida Lime & Avocado Growers, Inc.* v. *Paul*, 373 U. S. 132, 142 (1963)).

Rather than facing up to the difficult but essential remedial choices to which its analysis inescapably gives rise, the Court takes the entirely unresponsive course of resolving a lawsuit that has not yet been filed. In the litigation it apparently contemplates, a contributor to the Spill Fund has challenged a particular expenditure of the Fund as being in conflict with § 114(c). In this situation, I might agree that the purpose of § 114(c)'s preemption of double *taxation* prevents New Jersey from *spending* these moneys on activities compensable under Superfund. Taxing and spending are obviously linked in § 114(c): taxes may not be levied to support funds indemnifying claims compensable under Superfund. Given this linkage, the hypothetical plaintiff might argue that § 114(c)'s prohibition of "double taxation" preempts state expenditures of Spill Fund moneys for Superfund-compensable claims generally, whether collected in a separately identifiable fund or not, on the theory that such expenditures would constitute the functional equivalent of a distinct "fund" whose purpose is to pay claims compensable under Superfund.[8]

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[8] New Jersey recognizes an obligation of expend Spill Fund moneys in furtherance of purposes not benefited by Superfund, and has promulgated regulations intended to promote administration of the State Spill Fund in conformity with Superfund by circumscribing permissible expenditures. See Regulations Governing New Jersey Spill Compensation Fund Expenditures in Light of Federal Superfund Law, N. J. Admin. Code 17:26–2.1 (Supp. 1985). These regulations limit Spill Fund expenditures to the following eight purposes: (1) "[t]he clean-up and removal of a petroleum or petroleum products discharge"; (2) certain third-party damages payments; (3) "[t]he administrative costs of the fund"; (4) "[t]he cost of purchasing or pre-positioning hazardous substance response equipment or other preparations for the response"; (5) the 10% State share of remedial costs; (6) the advancement of moneys for the clean-up and removal of hazardous substances for which the State has a prior commitment for reimbursement from Superfund; (7) for the above purpose if the State fund administrator promptly applies for federal reimbursement; and (8) any payments authorized by the act using tax revenues collected before the effective date of Superfund. 14 N. J. Reg. 36(b). Appellants have contested only purposes five through seven. See App. to Brief on Behalf of Plaintiffs-Appel-

But whatever the merits of the hypothesized challenge to particular State expenditures, the case or controversy which would raise it is *not* before this Court. Appellants challenge the Spill Fund tax in its entirety; they make no claim for a partial refund. App. to Brief on Behalf of Plaintiffs-Appellants in No. A-3913-81T1 (N. J. Super. Ct.), pp. 2a-7a (N. J. Tax Court Complaint ¶¶3-4); *id.*, at 16a-23a (N. J. Chancery Division Complaint ¶¶11-36); Tr. in Nos. SC 319A-81 & SC 303A-81, p. 34 (N. J. Tax Court). This litigation does not concern any particular expenditure of Spill Fund assets for *any* purpose, let alone the purpose described in § 114(c).[9] As a consequence, it is plainly inappropriate to let stand the Spill Fund tax challenged by appellants and instead order New Jersey to restrict Fund expenditures not properly before us.

Of course, if the hypothesized challenge were successful, the Court would be entirely correct that the next question would be whether New Jersey would have set the same tax rate despite circumscription of the purposes for which the Fund might be expended, and that this state-law question should be left for the New Jersey courts.[10] The only ques-

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lants in No. A-3913-81T1 (N. J. Super. Ct.), pp. 122a-126a. See also n. 4, *supra*. Appellants' challenge to the validity of the fifth purpose is not pressed in this Court; the sixth and seventh purposes provide for the advancement of clean-up funds (in effect, loans) in anticipation of an award of federal funds.

These regulations were held invalid by the New Jersey intermediate appellate court for failure to satisfy a statutory notice period, *Exxon Corp.* v. *Hunt*, 190 N. J. Super. 131, 133-134, 462 A. 2d 193, 195 (1983), and they are not before us. According to the New Jersey Office of Administrative Law, the regulation, although invalid, is still "on the books." Further action presumably awaits the decision of this Court.

[9] Indeed, the record on which the New Jersey Tax Court awarded summary judgment was so lacking in information regarding Spill Fund expenditures that appellants saw the need to supplement the record in this Court.

[10] If the New Jersey courts were to hold that the proscribed purposes were severable from the permissible ones, appellants would be entitled to

tion before us today, however, is whether "the purpose" of the New Jersey tax is to fund claims which may be compensated under Superfund. For me, the universal agreement that the tax moneys poured into New Jersey's Spill Fund may be spent in furtherance of entirely valid purposes is sufficient to sustain the State tax.

The judgment of the Supreme Court of New Jersey should be affirmed.

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no refund. If it were to find instead that the legitimate purposes were inseparable from the purposes described in § 114(c), the Spill Fund would stand or fall in its entirety.

It seems likely that the New Jersey courts would find the invalid provisions severable. The New Jersey Tax Court found a "legislative intent that every purpose of spill fund was to be accomplished" and concluded that "the Legislature specifically envisioned that the spill act would be enforced in conjunction with any other applicable law." *Exxon Corp.* v. *Hunt*, 4 N. J. Tax 294, —— (1982) (App. to Juris. Statement 77a). Accordingly, it held that "even if § 114(c) of super fund could be construed to preempt part of spill fund, the aforementioned nonpreempted areas are more than sufficient to sustain its continued validity." *Ibid.* The New Jersey Supreme Court acknowledged the Tax Court's alternative holding, but relied on its primary holding that § 114(c) preempted only claims actually compensated to uphold the Spill Fund. See 97 N. J., at 530, 481 A. 2d, at 273.

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([illegible]Opinion)

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Lumber Co.*, 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

IES 3/14

Syllabus

PACIFIC GAS & ELECTRIC CO. *v.* PUBLIC UTILITIES COMMISSION OF CALIFORNIA ET AL.

APPEAL FROM THE SUPREME COURT OF CALIFORNIA

No. 84-1044. Argued October 8, 1985—Decided February 25, 1986

Appellant Pacific Gas and Electric Co. has distributed a newsletter in its monthly billing statements for many years. The newsletter has included political editorials, feature stories on matters of public interest, tips on energy conservation, and information about utility services and bills. Appellee Toward Utility Rate Normalization (TURN), in a ratemaking proceeding before appellee California Public Utilities Commission (Commission), urged the Commission to forbid appellant to use billing envelopes to distribute political editorials, on the ground that appellant's customers should not bear the expense of appellant's own political speech. The Commission decided that the envelope space that appellant had used to disseminate the newsletter was the ratepayers' property, defining this "extra space" as the space left over after including the bill and required notices. In an effort to apportion this "extra space" between appellant and its customers, the Commission permitted TURN to use the "extra space" four times a year to raise funds and to communicate with ratepayers with no limitation except to state that its messages were not those of appellant. Arguing that it had a First Amendment right not to help spread a message with which it disagrees, appellant appealed the Commission's order to the California Supreme Court, which denied discretionary review.

Held: The Commission's decision must be vacated.

Remanded.

JUSTICE POWELL, joined by THE CHIEF JUSTICE, JUSTICE BRENNAN, and JUSTICE O'CONNOR, concluded:

1. The Commission's order impermissibly burdens appellant's affirmative First Amendment rights. Pp. 6-15.

(a) The order awards access to the billing envelopes only to persons or groups, such as TURN, who disagree with appellant's views as expressed in its newsletter and who oppose appellant in Commission proceedings. Such one-sidedness impermissibly burdens appellant's expression. Appellant must contend with the fact that whenever it speaks out on a given issue, it may be forced to help disseminate hostile views. Appellant "might well conclude" that, under these circumstances, "the safe course is to avoid controversy," thereby reducing the free flow of information and ideas. *Miami Herald Publishing Co.* v. *Tornillo*, 418 U. S. 241, 257. Pp. 6–7, 9–11.

(b) The order also impermissibly requires appellant to associate with speech with which appellant may disagree. Appellant may be forced either to appear to agree with TURN's views or to respond. That kind of forced response is antithetical to the free discussion that the First Amendment fosters. For corporations as for individuals, the choice to speak includes within it the choice of what not to say. *Tornillo, supra*, at 258. Pp. 7, 12–13.

(c) The Commission's determination that the envelopes' "extra space" belongs to the ratepayers does not correct the order's constitutional deficiency. The billing envelopes remain appellant's property. Under the Commission's order, appellant must use that property to disseminate views with which it disagrees. Pp. 13–15.

2. The order is neither a narrowly tailored means of serving a compelling state interest, nor a permissible time, place, or manner regulation. Pp. 15–17.

JUSTICE MARSHALL concluded that the State, pursuant to the Commission's order, has redefined a property right in the "extra space" in appellant's billing envelopes in such a way as to achieve a result—burdening one party's speech in order to enhance another party's speech—that the First Amendment disallows. *PruneYard Shopping Center* v. *Robins*, 447 U. S. 74, distinguished. Pp. 1–5.

POWELL, J., announced the judgment of the Court and delivered an opinion, in which BURGER, C. J., and BRENNAN and O'CONNOR, JJ., joined. BURGER, C. J., filed a concurring opinion. MARSHALL, J., filed an opinion concurring in the judgment. REHNQUIST, J., filed a dissenting opinion, in which as to Part I WHITE and STEVENS, JJ., joined. STEVENS, J., filed a dissenting opinion. BLACKMUN, J., took no part in the consideration or decision of the case.

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D. C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

No. 84–1044

PACIFIC GAS AND ELECTRIC COMPANY, APPELLANT *v.* PUBLIC UTILITIES COMMISSION OF CALIFORNIA ET AL.

ON APPEAL FROM THE SUPREME COURT OF CALIFORNIA

[February 25, 1986]

JUSTICE POWELL announced the judgment of the Court and delivered an opinion in which the CHIEF JUSTICE, JUSTICE BRENNAN, and JUSTICE O'CONNOR joined.

The question in this case is whether the California Public Utilities Commission may require a privately owned utility company to include in its billing envelopes speech of a third party with which the utility disagrees.

I

For the past 62 years, appellant Pacific Gas and Electric Company has distributed a newsletter in its monthly billing envelope. Appellant's newsletter, called *Progress*, reaches over three million customers. It has included political editorials, feature stories on matters of public interest, tips on energy conservation, and straightforward information about utility services and bills. App. to Juris. Statement A–66, A–183 to A–190.[1]

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[1] For example, the December 1984 issue of *Progress* included a story on appellant's "automatic payment" and "balanced payment" plans, an article instructing ratepayers on how to weatherstrip their homes, recipes for holiday dishes, and a feature on appellant's efforts to help bald eagles in the Pit River area of California. App. to Juris. Statement A–183 to A–190. When the Commission first addressed the question whether appellant could continue to have exclusive access to its billing envelopes, it noted that *Progress* has previously discussed the merits of recently-passed and pending legislation in Congress. *Id.*, at A–66.

In 1980, appellee Toward Utility Rate Normalization (TURN), an intervenor in a ratemaking proceeding before California's Public Utilities Commission, another appellee,[2] urged the Commission to forbid appellant to use the billing envelopes to distribute political editorials, on the ground that the appellant's customers should not bear the expense of appellant's own political speech. *Id.*, at A–2. The Commission decided that the envelope space that appellant had used to disseminate *Progress* is the property of the ratepayers. *Id.*, at A–2 to A–3.[3] This "extra space" was defined as "the space remaining in the billing envelope, after inclusion of the monthly bill and any required legal notices, for inclusion of other materials up to such total envelope weight as would not result in any additional postage cost." *Ibid.*

In an effort to apportion this "extra space" between appellant and its customers, the Commission permitted TURN to use the "extra space" four times a year for the next two years. During these months, appellant may use any space not used by TURN and it may include additional materials if it pays any extra postage. The Commission found that TURN has represented the interests of "a significant group" of appellant's residential customers, *id.*, at A–15, and has aided the Commission in performing its regulatory function, *id.*, at A–49 to A–50. Consequently, the Commission determined that ratepayers would benefit from permitting TURN to use the extra space in the billing envelopes to raise funds and to communicate with ratepayers: "Our goal . . . is to change the present system to one which uses the extra space more efficiently for the ratepayers' benefit. It is reasonable to assume that the ratepayers will benefit more from exposure to a variety of views than they will from only that of PG&E." *Id.*, at A–17. The Commission concluded that appellant could have no interest in excluding TURN's message from the billing envelope since appellant does not own the space that message would fill. *Id.*, at A–23.[4] The Commission-sion placed no limitations on what TURN or appellant could say in the envelope, except that TURN is required to state that its messages are not those of appellant. *Id.*, at A–17 to A–18. The Commission reserved the right to grant other groups access to the envelopes in the future.[5] *Ibid.*

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[2] In addition to TURN and the Commission, there are five other appellees: Consumers Union, Consumer Federation of California, Common Cause of California, California Public Interest Research Group, and California Association of Utility Shareholders. Only TURN claims a direct interest in the outcome of this case; the other appellees appear to be intervenors concerned only with this case's precedential effects. Only the Commission and TURN have filed separate briefs in this Court.

[3] The Commission summarized its reasoning as follows:

"[E]nvelope and postage costs and any other costs of mailing bills are a necessary part of providing utility service to the customer . . . . However, due to the nature of postal rates . . . extra space exists in these billing envelopes. . . . Mindful that the extra space is an artifact generated with ratepayer funds, and is not an intended or necessary item of rate base, and that the only alternative treatment would unjustly enrich PG&E and simultaneously deprive the ratepayers of the value of that space, we concluded that the extra space in the billing envelope 'is properly considered as ratepayer property.'" *Id.*, at A–3.

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[4] Commissioners Bagley and Calvo dissented from the Commission's decision to grant TURN access to the billing envelopes. Commissioner Bagley argued that the Commission's order had potentially sweeping consequences for various kinds of property interests:

"The face of every utility-owned dam, the side of every building, the surface of every gas holder rising above our cities, and the bumpers of every utility vehicle—to name just a few relevant examples—have 'excess space' and 'economic advertising value.' Some utility corporations place bumper-strip messages on their vehicles. Buses and trucks regularly carry advertising messages. In the words of the majority at page 23 of the decision, 'It is reasonable to assume that the ratepayers will benefit from exposure to a variety of views. . . .' Is it the postulate of this Commission, flowing from the decision's stated premise . . . that ratepayers would benefit from exposure to some particular socially desirable message from some ratepayer group making use of any or all such areas of excess valuable space?" *Id.*, at A–40.

Commissioner Bagley also argued that the Commission's decision would require the Commission to make forbidden content-based distinctions in order to allocate the extra space among competing speakers. *Id.*, at A–41. Commissioner Calvo contended, first, that the order infringed appellant's First Amendment rights, and second, that it was unnecessary because "TURN has other opportunities to reach its natural audience." *Id.*, at A–56. Commissioner Calvo noted that the Commission often awarded TURN and similar groups fees for their participation in ratemaking proceedings, funds that presumably could finance separate mailings. *Ibid.*

Appellant appealed the Commission's order to the California Supreme Court, arguing that it has a First Amendment right not to help spread a message with which it disagrees, see *Wooley* v. *Maynard*, 430 U. S. 705 (1977), and that the Commission's order infringes that right. The California Supreme Court denied discretionary review. We noted probable jurisdiction, 470 U. S. —— (1985), and now reverse.

II

The constitutional guarantee of free speech "serves significant societal interests" wholly apart from the speaker's interest in self-expression. *First National Bank of Boston* v. *Bellotti*, 435 U. S. 765, 776 (1978). By protecting those who wish to enter the marketplace of ideas from government attack, the First Amendment protects the public's interest in receiving information. See *Thornhill* v. *Alabama*, 310 U. S. 88, 102 (1940); *Saxbe* v. *Washington Post Co.*, 417 U. S. 843, 863–864 (1974) (POWELL, J., dissenting). The identity of the speaker is not decisive in determining whether speech is protected. Corporations and other associations, like individuals, contribute to the "discussion, debate, and the dissemination of information and ideas" that the First Amendment seeks to foster. *First National Bank of Boston* v. *Bellotti*,

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[5] The Commission has already *denied* access to at least one group based on the content of its speech. The Commission denied the application of a taxpayer group—the "Committee of More than One Million Taxpayers to Save Proposition 13"—on the ground that that group neither wished to participate in Commission proceedings nor alleged that its use of the billing envelope space would improve consumer participation in those proceedings. App. to Juris. Statement A–157 to A–164. The record does not reveal whether any other groups have sought access to the billing envelopes.

supra, at 783 (citations omitted). Thus, in *Bellotti*, we invalidated a state prohibition aimed at speech by corporations that sought to influence the outcome of a state referendum. *Id.*, at 795. Similarly, in *Consolidated Edison Co.* v. *Public Service Comm'n of N. Y.*, 447 U. S. 530, 544 (1980), we invalidated a state order prohibiting a privately owned utility company from discussing controversial political issues in its billing envelopes. In both cases, the critical considerations were that the State sought to abridge speech that the First Amendment is designed to protect, and that such prohibitions limited the range of information and ideas to which the public is exposed. *First National Bank of Boston* v. *Bellotti*, *supra*, at 776–778, 781–783; *Consolidated Edison Co.* v. *Public Service Comm'n of N. Y.*, *supra*, at 533–535.

There is no doubt that under these principles appellant's newsletter *Progress* receives the full protection of the First Amendment. *Lovell* v. *Griffin*, 303 U. S. 444, 452 (1938). In appearance no different from a small newspaper, *Progress*' contents range from energy-saving tips to stories about wildlife conservation, and from billing information to recipes. App. to Juris. Statement A–183 to A–190. *Progress* thus extends well beyond speech that proposes a business transaction, see *Zauderer* v. *Office of Disciplinary Counsel*, 471 U. S. ——, —— (1985); *Central Hudson Gas & Electric Corp.* v. *Public Service Comm'n of N. Y.* 447 U. S. 557, 561–563 (1980), and includes the kind of discussion of "matters of public concern" that the First Amendment both fully protects and implicitly encourages. *Thornhill* v. *Alabama*, *supra*, at 101.

The Commission recognized as much, but concluded that requiring appellant to disseminate TURN's views did not infringe upon First Amendment rights. It reasoned that appellant remains free to mail its own newsletter except for the four months in which TURN is given access. The Commission's conclusion necessarily rests on one of two premises: (i) compelling appellant to grant TURN access to a hitherto private forum does not infringe appellant's right to speak; or (ii) appellant has no property interest in the relevant forum and therefore has no constitutionally protected right in restricting access to it. We now examine those propositions.

III

Compelled access like that ordered in this case both penalizes the expression of particular points of view and forces speakers to alter their speech to conform with an agenda they do not set. These impermissible effects are not remedied by the Commission's definition of the relevant property rights.

A

This Court has previously considered the question whether compelling a private corporation to provide a forum for views other than its own may infringe the corporation's freedom of speech. *Miami Herald Publishing Co.* v. *Tornillo*, 418 U. S. 241 (1974); see also *PruneYard Shopping Center* v. *Robins*, 447 U. S. 74, 85–88 (1980); *id.*, at 98–100 (POWELL, J., joined by WHITE, J., concurring in part and in the judgment). *Tornillo* involved a challenge to Florida's right-of-reply statute. The Florida law provided that, if a newspaper assailed a candidate's character or record, the candidate could demand that the newspaper print a reply of equal prominence and space. 418 U. S., at 244–245, and n. 2.

We found that the right-of-reply statute directly interfered with the newspaper's right to speak in two ways. *Id.*, at 256. First, the newspaper's expression of a particular viewpoint triggered an obligation to permit other speakers, with whom the newspaper disagreed, to use the newspaper's facilities to spread their own message. The statute purported to advance free discussion, but its effect was to deter newspapers from speaking out in the first instance: by forcing the newspaper to disseminate opponents' views, the statute penalized the newspaper's own expression. We therefore concluded that a "[g]overnment-enforced right of access *inescapably* 'dampens the vigor and limits the variety of public debate.'" *Id.*, at 257 (emphasis added) (quoting *New York Times Co.* v. *Sullivan*, 376 U. S. 254, 279 (1963).[6]

Second, we noted that the newspaper's "treatment of public issues and public officials—whether fair or unfair—constitute[s] the exercise of editorial control and judgment." 418 U. S., at 258. Florida's statute interfered with this "editorial control and judgment" by forcing the newspaper to tailor its speech to an opponent's agenda, and to respond to candidates' arguments where the newspaper might prefer to be silent. Cf. *Wooley* v. *Maynard*, 430 U. S. 705, 714 (1977); *Board of Education* v. *Barnette*, 319 U. S. 624, 633–634 (1943). Since *all* speech inherently involves choices of what to say and what to leave unsaid, this effect was impermissible. As we stated last Term, "'The essential thrust of the First Amendment is to prohibit improper restraints on the *voluntary* public expression of ideas. . . . There is necessarily . . . a concomitant freedom *not* to speak publicly, one which serves the same ultimate end as freedom of speech in its affirmative aspect.'" *Harper & Row Publishers, Inc.* v. *Nation Enterprises*, 471 U. S. ——, —— (1985) (quoting *Estate of Hemingway* v. *Random House*, 23 N. Y. 2d 341, 348, 244 N. E. 2d 250, 255 (1968)) (emphasis in original). See *PruneYard, supra*, at 99–100 (opinion of POWELL, J.).

The concerns that caused us to invalidate the compelled access rule in *Tornillo* apply to appellant as well as to the institutional press.[7] See *First National Bank of Boston* v. *Bellotti*, 435 U. S., at 782–784. Cf. *Lovell* v. *Griffin*, 303 U. S., at 452. Just as the state is not free to "tell a newspaper in advance what it can print and what it cannot," *Pittsburgh Press Co.* v. *Human Relations Comm'n*, 413 U. S. 376, 400 (1973) (Stewart, J., dissenting); see also *PruneYard*, 447 U. S., at 88, the State is not free either to restrict appellant's speech to certain topics or views or to force appellant to respond to views that others may hold. *Consolidated Edison Co.* v. *Public Service Comm'n of N. Y.*, 447 U. S., at 533–535. See *PruneYard*, *supra*, at 100 (opinion of POWELL, J.); *Abood* v. *Detroit Board of Education*, 431 U. S. 209, 241 (1977). Under *Tornillo* a forced access rule that would accomplish these purposes indirectly is similarly forbidden.

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[6] This Court has sustained a limited government-enforced right of access to broadcast media. *Red Lion Broadcasting Co.* v. *FCC*, 395 U. S. 367 (1969). Cf. *Columbia Broadcasting System, Inc.* v. *Democratic National Committee*, 412 U. S. 94 (1973). Appellant's billing envelopes do not, however, present the same constraints that justify the result in *Red Lion*: "[A] broadcaster communicates through use of a scarce, publicly owned resource. No person can broadcast without a license, whereas all persons are free to send correspondence to private homes through the mails." *Consolidated Edison Co.* v. *Public Service Comm'n of N. Y.*, 447 U. S. 530, 543 (1980).

The Court's decision in *PruneYard Shopping Center* v. *Robins*, 447 U. S. 74 (1980), is not to the contrary. In *PruneYard*, a shopping center owner sought to deny access to a group of students who wished to hand out pamphlets in the shopping center's common area. The California Supreme Court held that the students' access was protected by the State constitution; the shopping center owner argued that this ruling violated *his* First Amendment rights. This

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[7] Unlike the right-of-reply statute at issue in *Tornillo*, the Commission's order does not require appellant to place TURN's message in appellant's newsletter. Instead, the Commission ordered appellant to place TURN's message in appellant's envelope four months out of the year. Like the Miami Herald, however, appellant is still required to carry speech with which it disagreed, and might well feel compelled to reply or limit its own speech in response to TURN's.

The Court's opinion in *Tornillo* emphasizes that the right-of-reply statute impermissibly deterred protected speech. *Miami Herald Publishing Co.* v. *Tornillo*, 418 U. S. 241, 256–257 (1974). In the last paragraph of the opinion, the Court concluded that an *independent* ground for invalidating the statute was its effect on editors' allocation of scarce newspaper space. *Id.*, at 258. See also *id.*, at 257, n. 22. That discussion in no way suggested that the State was free otherwise to burden the newspaper's speech as long as the actual paper on which the newspaper was printed was not invaded.

Court held that the shopping center did not have a constitutionally protected right to exclude the pamphleters from the area open to the public at large. 447 U. S., at 88. Notably absent from *PruneYard* was any concern that access to this area might affect the shopping center owner's exercise of his own right to speak: the owner did not even allege that he objected to the content of the pamphlets; nor was the access right content-based. *PruneYard* thus does not undercut the proposition that forced associations that burden protected speech are impermissible.[*]

B

The Commission's order is inconsistent with these principles. The order does not simply award access to the public at large; rather, it discriminates on the basis of the viewpoints of the selected speakers. Two of the acknowledged purposes of the access order are to offer the public a greater variety of views in appellant's billing envelope, and to assist groups (such as TURN) that challenge appellant in the Commission's ratemaking proceedings in raising funds. App. to Juris. Statement A-16 to A-17. Access to the envelopes thus is not content-neutral. The variety of views that the Commission seeks to foster cannot be obtained by including speakers whose speech agrees with appellant's. Similarly, the perceived need to raise funds to finance participation in ratemaking proceedings exists only where the relevant groups represent interests that diverge from appellant's interests. Access is limited to persons or groups—such as TURN—who disagree with appellant's views as expressed in *Progress* and who oppose appellant in Commission proceedings.[9]

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[*] In addition, the relevant forum in *PruneYard* was the open area of the shopping center into which the general public was invited. This area was, almost by definition, peculiarly public in nature. *PruneYard*, *supra*, at 83, 88. There is no correspondingly public aspect to appellant's billing envelopes. See *post*, at —— (MARSHALL, J., concurring in judgment).

Such one-sidedness impermissibly burdens appellant's own expression. *Tornillo* illustrates the point. Access to the newspaper in that case was content-based in two senses: (i) it was triggered by a particular category of newspaper speech, and (ii) it was awarded only to those who disagreed with the newspaper's views. The Commission's order is not, in *Tornillo*'s words, a "content-based penalty" in the first sense, because TURN's access to appellant's envelopes is not conditioned on any particular expression by appellant. Cf. *Tornillo*, 418 U. S., at 256. But because access is awarded only to those who disagree with appellant's views and who are hostile to appellant's interests, appellant must contend with the fact that whenever it speaks out on a given issue, it may be forced—at TURN's discretion—to help disseminate hostile views. Appellant "might well conclude" that, under these circumstances, "the safe course is to avoid controversy," thereby reducing the free flow of information and ideas that the First Amendment seeks to promote. *Id.*, at 257.

Appellant does not, of course, have the right to be free from vigorous debate. But it *does* have the right to be free from government restrictions that abridge its own rights in order to "enhance the relative voice" of its opponents. *Buckley* v. *Valeo*, 424 U. S. 1, 49 and n. 55 (1976). The Commission's order requires *appellant* to assist in disseminating *TURN*'s views; it does not equally constrain both sides of the debate about utility regulation.[10] This kind of favoritism goes well beyond the fundamentally content-neutral subsidies that we sustained in *Buckley* and in *Regan* v. *Taxation With Representation*, 461 U. S. 540 (1983). See *Buckley*, *supra* at 97–105 (sustaining funding of general election campaign expenses of major party candidates); *Regan*, *supra*, at 546–550 (sustaining tax deduction for contributors to veterans' organizations). Unlike these permissible government subsidies of speech, the Commission's order identifies a favored speaker "based on the identity of the interests that [the speaker] may represent," *First National Bank of Boston* v. *Bellotti*, *supra*, at 784, and forces the speaker's opponent—not the taxpaying public—to assist in disseminating the speaker's message. Such a requirement necessarily burdens the expression of the disfavored speaker.

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[9] This is fully borne out by the order that triggered this appeal. TURN, the only entity to receive access to appellant's billing envelope, purports to represent the interest of a group of appellant's customers: residential ratepayers. App. to Juris. Statement A-14. The Commission's opinion plausibly assumes that the interest of residential ratepayers will often conflict with appellant's interest. *Id.*, at A-50.

Nor does the fact that TURN will use the envelopes to make fundraising appeals lessen the burden on appellant's speech. Cf. *post*, at —— (STEVENS, J., dissenting). The Commission has "disavowed any intention of looking at the way that TURN solicits funds," leaving TURN free to "speak and advocate its own position as best it can" in its billing envelope inserts. Tr. Oral. Arg. 31–32, 39. Thus, while TURN's advocacy may be aimed at convincing ratepayers to make donations, that goal does not alter the open-ended nature of the access awarded in this case, because it does not restrict the scope or content of TURN's message. Cf. *Heffron* v. *International Society for Krishna Consciousness*, 452 U. S. 640, 647 (1981).

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[10] JUSTICE STEVENS analogizes this aspect of the Commission's order to Securities and Exchange Commission regulations that require management to transmit proposals of minority shareholders in shareholder mailings. *Post*, at ——. The analogy is inappropriate. The regulations JUSTICE STEVENS cites differ from the Commission's order in two important ways. First, they allocate shareholder property between management and certain groups of shareholders. Management has no interest in corporate property except such interest as derives from the shareholders; therefore, regulations that limit management's ability to exclude some shareholders' views from corporate communications do not infringe corporate First Amendment rights. Second, the regulations govern speech by a corporation *to itself*. *Bellotti* and *Consolidated Edison* establish that the Constitution protects corporations' right to speak to the public based on the informational value of corporate speech. *Supra*, at 4–5. Rules that define how corporations govern themselves do not limit the range of information that the corporation may contribute to the public debate. The Commission's order, by contrast, burden's appellant's right freely to speak to the public at large.

The Commission's access order also impermissibly requires appellant to associate with speech with which appellant may disagree. The order on its face leaves TURN free to use the billing envelopes to discuss any issues it chooses.[11] Should TURN choose, for example, to urge appellant's customers to vote for a particular slate of legislative candidates, or to argue in favor of legislation that could seriously affect the utility business, appellant may be forced either to appear to agree with TURN's views or to respond. *PruneYard*, *supra*, at 98–100 (opinion of POWELL, J.).[12] This pressure to respond "is particularly apparent when the owner has taken a position opposed to the view being expressed on his property." *Id.*, at 100. Especially since TURN has been given access in part to create a multiplicity of views in the envelopes, there can be little doubt that appellant will feel compelled to respond to arguments and allegations made by TURN in its messages to appellant's customers.

That kind of forced response is antithetical to the free discussion that the First Amendment seeks to foster. *Harper & Row*, 471 U. S., at ——. See also *Wooley* v. *Maynard*,

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[11] The presence of a disclaimer on TURN's messages, see *supra*, at 4, does not suffice to eliminate the impermissible pressure on appellant to respond to TURN's speech. The disclaimer serves only to avoid giving readers the mistaken impression that TURN's words are really those of appellant. *PruneYard*, 447 U. S., at 99 (opinion of POWELL, J.). It does nothing to reduce the risk that appellant will be forced to respond when there is strong disagreement with the substance of TURN's message. *Ibid.*

[12] The Commission's order is thus readily distinguishable from orders requiring appellant to carry various legal notices, such as notices of upcoming Commission proceedings or of changes in the way rates are calculated. The State, of course, has substantial leeway in determining appropriate information disclosure requirements for business corporations. See *Zauderer* v. *Office of Disciplinary Counsel*, 471 U. S. ——, —— (1985). Nothing in *Zauderer* suggests, however, that the State is equally free to require corporations to carry the messages of third parties, where the messages themselves are biased against or are expressly contrary to the corporation's views.

430 U. S., at 714.[13] For corporations as for individuals, the choice to speak includes within it the choice of what not to say. *Tornillo, supra,* at 258. And we have held that speech does not lose its protection because of the corporate identity of the speaker. *Bellotti, supra,* at 777; *Consolidated Edison, supra,* at 533. Were the government freely able to compel corporate speakers to propound political messages with which they disagree, this protection would be empty, for the government could require speakers to affirm in one breath that which they deny in the next. It is therefore incorrect to say, as do appellees, that our decisions do not limit the government's authority to compel speech by corporations. The danger that appellant will be required to alter its own message as a consequence of the government's coercive action is a proper object of First Amendment solicitude, because the message itself is protected under our decisions in *Bellotti* and *Consolidated Edison.* Where, as in this case, the danger is one that arises from a content-based grant of access to private property, it is a danger that the government may not impose absent a compelling interest.

C

The Commission has emphasized that appellant's customers own the "extra space" in the billing envelopes. App. to Juris. Statement A–64 to A–66. According to appellees, it follows that appellant cannot have a constitutionally protected interest in restricting access to the envelopes. This argument misperceives both the relevant property rights and the nature of the State's First Amendment violation.[14]

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[13] As we stated in *Wooley,* "[a] system which secures the right to proselytize religious, political, and ideological causes must also guarantee the concomitant right to decline to foster such concepts." 430 U. S., at 714.

[14] Appellees also argue that appellant's status as a regulated utility company lessens its right to be free from state regulation that burdens its speech. We have previously rejected this argument. *Consolidated Edison Co.* v. *Public Service Comm'n of N. Y.,* 447 U. S., at 534, n. 1 ("Consolidated Edison's position as a regulated monopoly does not decrease the

The Commission expressly declined to hold that under California law appellant's customers own the entire billing envelopes and everything contained therein. *Id.*, at A-2 to A-3. It decided only that the ratepayers own the "extra space" in the envelope, defined as that space left over after including the bill and required notices, up to a weight of one ounce. *Ibid.* The envelopes themselves, the bills, and *Progress* all remain appellant's property. The Commission's access order thus clearly requires appellant to use *its* property as a vehicle for spreading a message with which it disagrees. In *Wooley* v. *Maynard*, we held that New Hampshire could not require two citizens to display a slogan on their license plates and thereby "use their private property as a 'mobile billboard' for the State's ideological message." 430 U. S., at 715. The "private property" that was used to spread the unwelcome message was the automobile, not the license plates. Similarly, the Commission's order requires appellant to use its property—the billing envelopes—to distribute the message of another. This is so whoever is deemed to own the "extra space."

A different conclusion would necessarily imply that our decision in *Tornillo* rested on the Miami Herald's ownership of the space that would have been used to print candidate replies. Nothing in *Tornillo* suggests that the result would have been different had the Florida Supreme Court decided that the newspaper space needed to print candidates' replies was the property of the newspaper's readers, or had the court ordered the Miami Herald to distribute inserts owned and prepared by the candidates together with its newspapers. The constitutional difficulty with the right-of-reply statute was that it required the newspaper to disseminate a message with which the newspaper disagreed. This difficulty did not depend on whether the particular paper on

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informative value of its opinions on critical public matters."). See also *Central Hudson Gas & Electric Corp.* v. *Public Service Comm'n of N. Y.*, 447 U. S. 557, 566-568 (1980).

which the replies were printed belonged to the newspaper or to the candidate.

Appellees' argument suffers from the same constitutional defect. The Commission's order forces appellant to disseminate TURN's speech in envelopes that appellant owns and that bear appellant's return address. Such forced association with potentially hostile views burdens the expression of views different from TURN's and risks forcing appellant to speak where it would prefer to remain silent. Those effects do not depend on who "owns" the "extra space."[15]

IV

Notwithstanding that it burdens protected speech, the Commission's order could be valid if it were a narrowly tailored means of serving a compelling state interest. *Consolidated Edison Co.* v. *Public Service Comm'n of N. Y.*, 447 U. S., at 535; *First National Bank of Boston* v. *Bellotti*, 435 U. S., at 786. Appellees argue that the access order does in fact further compelling state interests. In the alternative, appellees argue that the order is a permissible time, place, or manner restriction. We consider these arguments in turn.

A

Appellees identify two assertedly compelling state interests that the access order is said to advance. First, appellees argue that the order furthers the State's interest in effective ratemaking proceedings. TURN has been a regular participant in those proceedings, and the Commission found that TURN has aided the Commission in performing its regulatory task. Appellees argue that the access order permits TURN to continue to help the Commission by assisting TURN in raising funds from the ratepayers whose interest TURN seeks to serve.

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[15] As the dissenting Commissioners correctly noted, see n. 4 *supra*, appellees' argument logically implies that the State may compel appellant or any other regulated business to use many different kinds of property to advance views with which the business disagrees. "Extra space" exists not only in billing envelopes but also on billboards, bulletin boards, and sides of buildings and motor vehicles. Under the Commission's reasoning, a State could force business proprietors of such items to use the space for the dissemination of speech the proprietor opposes. At least where access to such fora is granted on the basis of the speakers' viewpoints, the public's ownership of the "extra space" does not nullify the First Amendment rights of the owner of the property from which that space derives.

The State's interest in fair and effective utility regulation may be compelling. The difficulty with appellees' argument is that the State can serve that interest through means that would not violate appellant's First Amendment rights, such as awarding costs and fees.[16] The State's interest may justify imposing on appellant the reasonable expenses of responsible groups that represent the public interest at ratemaking proceedings. But "we find 'no substantially relevant correlation between the governmental interest asserted and the State's effort'" to compel appellant to distribute TURN's speech in appellant's envelopes. *First National Bank of Boston* v. *Bellotti*, *supra*, at 795 (quoting *Shelton* v. *Tucker*, 364 U. S. 479, 485 (1960)).

Second, appellees argue that the order furthers the State's interest in promoting speech by making a variety of views available to appellant's customers. Cf. *Buckley* v. *Valeo*, 424 U. S., at 92–93 and n. 127. We have noted above that this interest is not furthered by an order that is not content neutral. Moreover, the means chosen to advance variety tend to inhibit expression of appellant's views in order to promote TURN's. Our cases establish that the State cannot advance some points of view by burdening the expression of others. *First National Bank of Boston* v. *Bellotti*, *supra*, at 785–786; *Buckley* v. *Valeo*, *supra*, at 48–49. It follows that the Commission's order is not a narrowly tailored means of furthering this interest.

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[16] Indeed, the Commission already does this. See *supra*, at 4 n. 4 (discussing Commissioner Calvo's dissent).

B

Appellees argue, finally, that the Commission's order is a permissible time, place, or manner regulation, since it "serve[s] a significant governmental interest and leave[s] ample alternative channels for communication." *Consolidated Edison Co.* v. *Public Service Comm'n of N. Y.*, 447 U. S, at 535; see also *Virginia Pharmacy Board* v. *Virginia Citizens Consumer Council*, 425 U. S. 748, 771 (1976). For a time, place, or manner regulation to be valid, it must be neutral as to the content of the speech to be regulated. *Clark* v. *Community for Creative Non-Violence*, 468 U. S. ——, —— (1984); see also *Erznoznik* v. *City of Jacksonville*, 422 U. S. 205, 210–212 (1975). As we have shown, the State's asserted interest in exposing appellant's customers to a variety of viewpoints is not—and does not purport to be—content-neutral.

V

We conclude that the Commission's order impermissibly burdens appellant's First Amendment rights because it forces appellant to associate with the views of other speakers, and because it selects the other speakers on the basis of their viewpoints. The order is not a narrowly tailored means of furthering a compelling state interest, and it is not a valid time, place, or manner regulation.

For these reasons, the decision of the California Public Utilities Commission must be vacated. The case is remanded to the California Supreme Court for further proceedings not inconsistent with this opinion.

It is so ordered.

JUSTICE BLACKMUN took no part in the consideration or decision of this case.

SUPREME COURT OF THE UNITED STATES

No. 84-1044

PACIFIC GAS AND ELECTRIC COMPANY, APPELLANT *v.* PUBLIC UTILITIES COMMISSION OF CALIFORNIA ET AL.

ON APPEAL FROM THE SUPREME COURT OF CALIFORNIA

[February 25, 1986]

CHIEF JUSTICE BURGER, concurring.

I join JUSTICE POWELL's opinion, but think we need not go beyond the authority of *Wooley* v. *Maynard*, 430 U. S. 705 (1977) to decide this case. I would not go beyond the central question presented by this case, which is the infringement of Pacific's right to be free from forced association with views with which it disagrees. I would also rely on that part of *Miami Herald Publishing Co.* v. *Tornillo*, 418 U. S. 241 (1974) holding that a forced right of reply violates a newspaper's right to be free from forced dissemination of views it would not voluntarily disseminate, just as we held that Maynard must be free from being forced by the State to disseminate views with which he disagreed. To compel Pacific to mail messages for others cannot be distinguished from compelling it to carry the messages of others on its trucks, its buildings, or other property used in the conduct of its business. For purposes of this case, those properties cannot be distinguished from property like the mailing envelopes acquired by Pacific from its income and resources.

SUPREME COURT OF THE UNITED STATES

No. 84-1044

PACIFIC GAS AND ELECTRIC COMPANY, APPELLANT *v.* PUBLIC UTILITIES COMMISSION OF CALIFORNIA ET AL.

ON APPEAL FROM THE SUPREME COURT OF CALIFORNIA

[February 25, 1986]

JUSTICE MARSHALL, concurring in the judgment.

In *PruneYard Shopping Center* v. *Robins*, 447 U. S. 74 (1980), we held that a State could, consistently with the Federal Constitution, prohibit the private owner of a shopping center from using state trespass law to exclude peaceful expressive activity in the open areas of the shopping center. Concurring in *PruneYard*, I viewed the State's abrogation of the property owner's traditional right to exclude as raising the question of how the Federal Constitution limits a State's ability to redefine its common-law property rights. See *id.*, at 92–93 (MARSHALL, J., concurring). Today we face a similar question. In the present case, California has taken from appellant the right to deny access to its property—its billing envelope—to a group that wishes to use that envelope for expressive purposes. Two significant differences between the State's grant of access in this case and the grant of access in *PruneYard* lead me to find a constitutional barrier here that I did not find in the earlier case.

The first difference is the degree of intrusiveness of the permitted access. We noted in *PruneYard:* "the shopping center by choice of its owner is not limited to the personal use of [its owner]. It is instead a business establishment that is open to the public to come and go as they please." *Id.*, at 87. The challenged rule did not permit a markedly greater intrusion onto the property than that which the owner had volun-

tarily encouraged, nor did it impair the commercial value of the property. *Id.*, at 83; see also *id.*, at 94 (MARSHALL, J., concurring).

In the present case, by contrast, appellant has never opened up its billing envelope to the use of the public.[1] Appellant has not abandoned its right to exclude others from its property to the degree that the shopping center owner had done in *PruneYard*. Were appellant to use its billing envelope as a sort of community billboard, regularly carrying the messages of third parties, its desire to exclude a particular speaker would be deserving of lesser solicitude. As matters stand, however, appellant has issued no invitation to the general public to use its billing envelope, for speech or for any other purpose.[2] Moreover, the shopping center in

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[1] The State seizes upon appellant's status as a regulated monopoly in order to argue that the inclusion of postage and other billing costs in the utility's rate base demonstrates that these items "belong" to the public, which has paid for them. However, a consumer who purchases food in a grocery store is "paying" for the store's rent, heat, electricity, wages, etc., but no one would seriously argue that the consumer thereby acquires a property interest in the store. That the utility passes on its overhead costs to ratepayers at a rate fixed by law rather than the market cannot affect the utility's ownership of its property, nor its right to use that property for expressive purposes, see *Consolidated Edison Co.* v. *Public Service Comm'n*, 447 U. S. 530, 534, n. 1 (1980). The State could have concluded that the public interest would be best served by state ownership of utilities. Having chosen to keep utilities in private hands, however, the State may not arbitrarily appropriate property for the use of third parties by stating that the public has "paid" for the property by paying utility bills.

I hasten to add that nothing in this opinion nor, as I understand it, the plurality's opinion, addresses the issue whether the State may exclude the cost of mailing *Progress* from petitioner's rate base. See *id.*, at 544 (MARSHALL, J., concurring). Indeed, appellant concedes that the State may force its shareholders to bear those costs.

[2] The State also argues that it frequently requires appellant to carry messages concerning utility ratemaking and the rights of utility consumers. These messages, however, do not include political speech, and are directly relevant to commercial transactions between the ratepayer and the utility. The State's interest in requiring appellant to carry such mes-

PruneYard bore a strong resemblance to the streets and parks that are traditional public forums. People routinely gathered there, at the owner's invitation, and engaged in a wide variety of activities. Adding speech to the list of those activities did not in any great way change the complexion of the property. The same is not true in this case.

The second difference between this case and *PruneYard* is that the State has chosen to give TURN a right to speak at the expense of appellant's ability to use the property in question as a forum for the exercise of its own First Amendment rights. While the shopping center owner in *PruneYard* wished to be free of unwanted expression, he nowhere alleged that his own expression was hindered in the slightest. In contrast, the present case involves a forum of inherently limited scope. By appropriating, four times a year, the space in appellant's envelope that appellant would otherwise use for its own speech, the State has necessarily curtailed petitioner's use of its own forum. The regulation in this case, therefore, goes beyond a mere infringement of appellant's desire to remain silent, see *post*, at 7–10 (REHNQUIST, J., dissenting).

While the interference with appellant's speech is, concededly, very slight, the State's justification—the subsidization of another speaker chosen by the State—is insufficient to sustain even that minor burden. We have held that the State may use its own resources for subsidization, *Regan* v. *Taxation with Representation of Washington*, 461 U. S. 540 (1983), but that interest, standing alone, cannot justify interference with the speech of others. See *Buckley* v. *Valeo*, 424 U. S. 1, 48–49 (1976) *(per curiam)*; *First National Bank*

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sages is therefore particularly compelling. Cf. *infra*, at ——. Somewhat analogously, the State could not argue that, because it may demand access for the State's agents to a private home to monitor compliance with health or safety regulations, see *Camara* v. *Municipal Court*, 387 U. S. 523 (1967), it may also grant access to third parties for nongovernmental purposes.

of Boston v. *Bellotti*, 435 U. S. 765, 790–792 (1978).[3] In the instant case, the only state interest identified by appellee is ensuring that ratepayers are "expos[ed] to a variety of views," App. to Juris. Statement A–17, in order to provide "the most complete understanding possible of energy-related issues," *id.*, at A–22. This is no different from the interest that we found insufficient to justify restraints on individual political expenditures in *Buckley* v. *Valeo, supra*. Even assuming that the State could assert a more compelling interest in, for example, curbing actual abuses of the ratemaking process, it has never demonstrated that its regulation is tailored to serve such an interest. Indeed, it disclaims any duty to make that showing, based on its conclusion that ratepayers "own" the extra space. See App. to Juris. Statement A–22. The regulation at issue here, therefore, differs significantly from the SEC proxy regulation cited by JUSTICE STEVENS, *post*, at 5.

In *PruneYard*, I recognized that the State may generally create or abrogate rights "'to attain a permissible legislative object.'" 447 U. S., at 92 (quoting *Silver* v. *Silver*, 280 U. S. 117, 122 (1929)). In the present case, the State has redefined a property right in the extra space in appellant's billing envelope in such a way as to achieve a result—burdening the speech of one party in order to enhance the speech of another—that the First Amendment disallows. In doing so, moreover, it has sanctioned an intrusion onto appellant's property that exceeds the slight incursion permitted in *PruneYard*. Under these circumstances, I believe that the State has crossed the boundary between constitutionally permissible and impermissible redefinitions of private property.

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[3] JUSTICE REHNQUIST's dissent argues that a State may freely affect the mix of information available to the public, so long as it only "indirectly and remotely" affects a particular speaker's contribution to that mix. See *post*, at 2. Even if I were to accept that proposition, I disagree with its application to this case.

While the interference with appellant's speech is small, it is by no means indirect. TURN clearly has the first claim to the "extra space" during four months out of every year. Appellant may use its own—and physically limited--forum during those months only to the extent TURN chooses not to use it. This infringement differs from the limitation on campaign contributions in *Buckley* v. *Valeo*, 424 U. S. 1 (1976) *(per curiam)*, because the speech element of a contribution—the message of support for a candidate—was only indirectly related to the size of the contribution. *Id.*, at 21. By definition, then, a limit on the size of contributions affected speech only indirectly. *Regan* v. *Taxation With Representation*, 461 U. S. 540 (1983), is likewise distinguishable. That case decided only that the Government could use its own funds to subsidize a preferred speaker. That subsidization caused *no* interference with anyone else's speech, much less indirect and remote interference.

In reaching this conclusion, I do not mean to suggest that I would hold, contrary to our precedents, that the corporation's First Amendment rights are coextensive with those of individuals, or that commercial speech enjoys the same protections as individual speech. In essentially all instances, the use of business property to carry out transactions with the general public will permit the State to restrict or mandate speech in order to prevent deception or otherwise protect the public's health and welfare. In many instances, such as in *PruneYard*, business property will be open to the public to such an extent that the public's expressive activities will not interfere with the owner's use of property to a degree that offends the Constitution. The regulation at issue in this case, I believe, falls on the other side of the line. Accordingly, I join the Court's judgment.

SUPREME COURT OF THE UNITED STATES

No. 84-1044

PACIFIC GAS AND ELECTRIC COMPANY, APPELLANT *v.* PUBLIC UTILITIES COMMISSION OF CALIFORNIA ET AL.

ON APPEAL FROM THE SUPREME COURT OF CALIFORNIA

[February 25, 1986]

JUSTICE REHNQUIST, with whom JUSTICE WHITE and JUSTICE STEVENS join as to Part I, dissenting.

The plurality concludes that a state-created, limited right of access to the extra space in a utility's billing envelopes unconstitutionally burdens the utility's right to speak if the utility has used the space itself to express political views to its customers. This is so even though the extra envelope space belongs to the customers as a matter of state property law. The plurality justifies its conclusion on grounds that the right of access may (1) deter the utility from saying things that might trigger an adverse response, or (2) induce it to respond to subjects about which it might prefer to remain silent, in violation of the principles established in *Miami Herald Publishing Co.* v. *Tornillo*, 418 U. S. 241 (1974), and *Wooley* v. *Maynard*, 430 U. S. 705 (1977). I do not believe that the right of access here will have any noticeable deterrent effect. Nor do I believe that negative free speech rights, applicable to individuals and perhaps the print media, should be extended to corporations generally. I believe that the right of access here is constitutionally indistinguishable from the right of access approved in *PruneYard Shopping Center* v. *Robins*, 447 U. S. 74 (1980), and therefore I dissent.[1]

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[1] This case does not involve the question whether the First Amendment provides a right of access to a private forum. See *Hudgens* v. *NLRB*, 424

I

This Court established in *First National Bank of Boston* v. *Bellotti*, 435 U. S. 765 (1978), that the First Amendment prohibits the Government from *directly* suppressing the affirmative speech of corporations. A newspaper publishing corporation's right to express itself freely is also implicated by governmental action that penalizes speech, see *Miami Herald Publishing Co.* v. *Tornillo*, *supra*, because the deterrent effect of a penalty is very much like direct suppression. Our cases cannot be squared, however, with the view that the First Amendment prohibits governmental action that only *indirectly* and *remotely* affects a speaker's contribution to the overall mix of information available to society.

Several cases illustrate this point. In *Buckley* v. *Valeo*, 424 U. S. 1 (1976) (*per curiam*), the Court upheld limits on political campaign contributions despite the argument that their likely effect would be "to mute the voices of affluent persons and groups in the election process and thereby to equalize the relative ability of all citizens to affect the outcome of elections." *Id.*, at 25–26. The Court explained that the potential effect on affluent speech of limiting access to this one forum was constitutionally insignificant because of the availability of other forums, *id.*, at 26, n. 26, and that the limitation protected the integrity of our representative democracy by limiting political *quid pro quos* and the appearance of corruption, *id.*, at 26–27. The Court also upheld a provision granting different levels of subsidies for presidential campaigns depending upon whether the party receiving the subsidy is a major, minor, or new party. *Id.*, at 87–88. The Court reasoned that the effect of the provision was "not

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U. S. 507 (1976); *Marsh* v. *Alabama*, 326 U. S. 501 (1946). The right of access in this case was granted by state law. See *PruneYard Shopping Center* v. *Robins*, 447 U. S. 74 (1980); *Miami Herald Publishing Co.* v. *Tornillo*, 418 U. S. 241 (1974); cf. *Columbia Broadcasting System, Inc.* v. *Democratic National Comm.*, 412 U. S. 94 (1973); *Red Lion Broadcasting Co., Inc.* v. *FCC*, 395 U. S. 367 (1969).

to abridge, restrict, or censor speech, but rather to use public money to facilitate and enlarge public discussion." *Id.*, at 92–93. Similarly, in *Regan* v. *Taxpayers with Representation*, 461 U. S. 540 (1983), the Court upheld a governmental decision to grant a subsidy to certain expressive groups yet deny it to others, depending on whether the groups served the statutory definition of public interest, even though this had the undeniable effect of enhancing the speech of some groups over the speech of others. The Court explained that Congress is free to subsidize some but not all speech. *Id.*, at 548.

PruneYard Shopping Center v. *Robins*, *supra*, illustrates the point in a case that is very similar to the one decided today. The State of California interpreted its own constitution to afford a right of access to private shopping centers for the reasonable exercise of speech and petitioning. *Id.*, at 78. While acknowledging that the First Amendment does not itself grant a right of access to private forums, *id.*, at 80–81, the Court upheld the state-created right against a First Amendment challenge. See *id.*, at 85–88. It reasoned that *Wooley* v. *Maynard*, *supra*, does not prohibit such a right of access because the views of those taking advantage of the right would not likely be identified with those of the owners, the State was not dictating any specific message, and the owners were free to disavow any connection to the message by posting disclaimers. 447 U. S., at 87. The Court similarly distinguished *West Virginia Board of Education* v. *Barnette*, 319 U. S. 624 (1943), stating that the right of access did not compel the owners to affirm their belief in government orthodoxy, and left them free to publicly dissociate themselves from the views of the speakers. 447 U. S., at 87–88. Finally, it distinguished *Miami Herald Publishing Co.* v. *Tornillo*, *supra*, on the ground that the right of access did not constitute a content-based penalty that would "'dampe[n] the vigor and limi[t] the variety of public debate.'" 447 U. S., at 88, quoting *Tornillo*, *supra*, at 257.

Of course, the First Amendment does prohibit governmental action affecting the mix of information available to the public if the effect of the action approximates that of direct content-based suppression of speech. Thus, while the Court in *Buckley* v. *Valeo*, *supra*, upheld limits on campaign contributions and allowed disparate governmental subsidies to various political parties, it struck down limitations on campaign expenditures because such limits "impose far greater restraints on the freedom of speech and association." *Id.*, at 44.[2] The Court reasoned that the Government's interest in equalizing the relative influence of individuals over election outcomes could not overcome the First Amendment, which was designed to encourage the widest dissemination of diverse views. *Id.*, at 44–45. Similarly, the Court suggested in *Regan* v. *Taxpayers with Representation*, *supra*, that governmental subsidies aimed at the suppression of dangerous ideas might not pass constitutional muster. *Id.*, at 550.

Miami Herald Publishing Co. v. *Tornillo*, 418 U. S. 241 (1974), held that a governmentally imposed "penalty" for the exercise of protected speech is sufficiently like direct suppression to trigger heightened First Amendment scrutiny. The Court in *Tornillo* struck down a statute granting political candidates a right to reply any time a private newspaper criticized them. See *id.*, at 244. The Court reasoned that the statute violated the First Amendment because it "exact[ed] a penalty on the basis of the content of a newspaper," *id.*, at 256, that would likely have the effect of "'dampe[ning] the vigor and limi[ting] the variety of public debate.'" *Id.*, at 257, quoting *New York Times Co.* v. *Sullivan*, 376 U. S. 254, 279 (1964).

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[2] This was the critical distinction between the contribution and expenditure limitations, and not the relative worth of the respective governmental interests. The Court in *Buckley* v. *Valeo*, 424 U. S. 1 (1976)(*per curiam*), never suggested that the interest served by the campaign limitation provision was a "compelling" one, nor examined the provision to determine whether it was sufficiently tailored to the interest to survive "heightened scrutiny." The Court was satisfied that the provision had only an indirect and minimal effect on First Amendment interests, as well as a rational basis. Nor did the Court treat the expenditure limitations differently because the governmental justification was less important. Instead, the relatively greater effect of these limitations on affirmative speech triggered heightened scrutiny, and a rational basis was no longer sufficient to justify them. See *Buckley*, *supra*, at 44–45.

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Although the plurality draws its deterrence rationale from *Tornillo*, it does not even attempt to characterize the right of access as a "penalty"; indeed, such a Procrustean effort would be doomed to failure. Instead, the plurality stretches *Tornillo* to stand for the general proposition that the First Amendment prohibits any regulation that deters a corporation from engaging in some expressive behavior. But the deterrent effect of any statute is an empirical question of degree. When the potential deterrent effect of a particular state law is remote and speculative, the law simply is not subject to heightened First Amendment scrutiny. See *supra*, at 2–4, and n. 2. The plurality does not adequately explain how the potential deterrent effect of the right of access here is sufficiently immediate and direct to warrant strict scrutiny. While a statutory penalty, like the right of reply statute in *Tornillo*, may sufficiently deter speech to trigger such heightened First Amendment scrutiny, the right of access here will not have such an effect on PG&E's incentives to speak.

The record does not support the inference that PUC issued its order to penalize PG&E because of the content of its inserts or because PG&E included the inserts in its billing envelopes in the first place. The order does not prevent PG&E from using the billing envelopes in the future to distribute inserts whenever it wishes. Nor does its vitality depend on whether PG&E includes inserts in any future billing envelopes. Moreover, the central reason for the access order—to provide for an effective ratepayer voice—would not vary in importance if PG&E had never distributed the inserts or ceased distributing them tomorrow. The most that can be said about the connection between the inserts and the order is that the existence of the inserts quite probably brought to TURN's attention the possibility of requesting access.

Nor does the access order create any cognizable risk of deterring PG&E from expressing its views in the most candid fashion. Unlike the reply statute in *Tornillo*, which conditioned access upon discrete instances of certain expression, the right of access here bears no relationship to PG&E's future conduct. PG&E cannot prevent the access by remaining silent or avoiding discussion of controversial subjects. The plurality suggests, however, that the possibility of minimizing the undesirable content of TURN's speech may induce PG&E to adopt a strategy of avoiding certain topics in hopes that TURN will not think to address them on its own. But this is an extremely implausible prediction. The success of such a strategy would depend on any group given access being little more than a reactive organization. TURN or any other group eventually given access will likely address the controversial subjects in spite of PG&E's silence. I therefore believe that PG&E will have no incentive to adopt the conservative strategy. Accordingly, the right of access should not be held to trigger heightened First Amendment scrutiny on the ground that it somehow might deter PG&E's right to speak.

II

The plurality argues, however, that the right of access also implicates PG&E's right not to speak or to associate with the speech of others, thereby triggering heightened scrutiny. The thrust of the plurality's argument is that if TURN has access to the envelopes, its speech will have the effect of *forcing* PG&E to address topics about which it would prefer to remain silent. The plausibility of any such prediction depends upon the perceived ineffectiveness of a disclaimer or the absence of any effective alternative means for consumer groups like TURN to communicate to the ratepayers. In *PruneYard Shopping Center* v. *Robins*, 447 U. S. 74 (1980), this Court held that the availability of an effective disclaimer was sufficient to eliminate any infringement upon negative free speech rights. *Id.*, at 87–88. If an alternative forum of communication exists, TURN or the other consumer groups will be able to *induce* PG&E to address the additional topics anyway. Finally, because PG&E retains complete editorial freedom over the content of its inserts, the effect of the right of access is likely to be qualitatively different from a direct prescription by the Government of "what shall be orthodox in . . . matters of opinion." *West Virginia Board of Education* v. *Barnette*, 319 U. S., at 642.

There is, however, a more fundamental flaw with the plurality's analysis. This Court has recognized that natural persons enjoy negative free speech rights because of their interest in self-expression; an individual's right not to speak or to associate with the speech of others is a component of the broader constitutional interest of natural persons in freedom of conscience. Thus, in *Barnette*, *supra*, this Court struck down a compulsory flag salute statute to protect "the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control." *Ibid.* Similarly, in *Wooley* v. *Maynard*, 430 U. S. 705 (1977), the Court invalidated a statute requiring an official slogan to be displayed on all license plates to protect the individual interest in "freedom of mind." *Id.*, at 714. See also *Abood* v. *Detroit Board of Education*, 431 U. S. 209, 234–235 (1977). Most recently, in *Harper & Row Publishers, Inc.* v. *Nation Enterprises*, 471 U. S. —— (1985), this Court rejected a public figure exception to the copyright law, reasoning that the protection of an author's profit incentive furthers rather than inhibits expression, *id.*, at —— (slip, at 15–19), and that an author has a countervailing First Amendment interest in "*freedom of thought* and expression [that] 'includes both the right to speak freely and the right to refrain from speaking at all.'" *Id.*, at —— (slip, at 19) (emphasis added), quoting *Wooley* v. *Maynard*, *supra*, at 714.

In *Miami Herald Publishing Co.* v. *Tornillo*, 418 U. S. 241 (1974), the Court extended negative free speech rights to newspapers without much discussion. The Court stated that the right of reply statute not only deterred affirmative speech, but it "fail[ed] to clear the barriers of the First Amendment because of its intrusion into the function of editors." *Id.*, at 258. The Court explained that interference with "the exercise of editorial control and judgment" creates a peril for the liberty of the press like government control over "what is to go into a newspaper." *Id.*, at 258, and n. 24, quoting 2 Z. Chafee, Government and Mass Communications 633 (1947). The Court did not elaborate further on the justification for its holding.

Extension of the individual freedom of conscience decisions to business corporations strains the rationale of those cases beyond the breaking point. To ascribe to such artificial entities an "intellect" or "mind" for freedom of conscience purposes is to confuse metaphor with reality. Corporations generally have not played the historic role of newspapers as conveyers of individual ideas and opinion. In extending positive free speech rights to corporations, this Court drew a distinction between the First Amendment rights of corporations and those of natural persons. See *First National Bank of Boston* v. *Bellotti*, 435 U. S. 765, 776 (1978); *Consolidated Edison Co.* v. *Public Service Comm'n*, 447 U. S. 530, 534–535, and n. 2 (1980). It recognized that corporate free speech rights do not arise because corporations, like individuals, have any interest in self-expression. See *Bellotti*, *supra*, at 777, and n. 12; *Consolidated Edison*, *supra*, at 534, n. 2. It held instead that such rights are recognized as an instrumental means of furthering the First Amendment purpose of fostering a broad forum of information to facilitate self-government. See *Bellotti*, *supra*, at 783; *Consolidated Edison*, *supra*, at 533.

The interest in remaining isolated from the expressive activity of others, and in declining to communicate at all, is for the most part divorced from this "broad public forum" purpose of the First Amendment. The right of access here constitutes an effort to facilitate and enlarge public discussion; it therefore furthers rather than abridges First Amendment values. See *Harper & Row Publishers, Inc.* v. *Nation Enterprises*, 471 U. S. ——, —— (1985) (slip, at 18); *Buckley* v. *Valeo*, 424 U. S., at 92–93. In *Zauderer* v. *Office of Disciplinary Counsel*, 471 U. S. —— (1985) this Court held that "[b]ecause the extension of First Amendment protection to commercial speech is justified principally by the value to consumers of the information such speech provides, . . . [the] constitutionally protected interest in *not* providing any particular factual information in [a business's] advertising is minimal." *Id.*, at —— (slip, at 23) (citation omitted). Likewise, because the interest on which the constitutional protection of corporate speech rests is the societal interest in receiving information and ideas, the constitutional interest of a corporation in not permitting the presentation of other distinct views clearly identified as those of the speaker is *de minimis*. This is especially true in the case of PG&E, which is after all a regulated public utility. Any claim it may have had to a sphere of corporate autonomy was largely surrendered to extensive regulatory authority when it was granted legal monopoly status.

This argument is bolstered by the fact that the two constitutional liberties most closely analogous to the right to refrain from speaking—the Fifth Amendment right to remain silent and the constitutional right of privacy—have been denied to corporations based on their corporate status. The Court in *Bellotti* recognized that some "'purely personal' guarantees . . . are unavailable to corporations and other organizations," 435 U. S., at 779, n. 14, and therefore declined to hold that "corporations have the full measure of rights that individuals enjoy under the First Amendment."

Id., at 777.[3]

III

PG&E is not an individual or a newspaper publisher; it is a regulated utility. The insistence on treating identically for constitutional purposes entities that are demonstrably different is as great a jurisprudential sin as treating differently those entities which are the same. Because I think this case is governed by *PruneYard*, *supra*, and not by *Tornillo*, *supra*, or *Wooley*, *supra*, I would affirm the judgment of the Supreme Court of California.

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[3] The extention of negative free speech rights to corporations would cast doubt upon the result in *Red Lion Broadcasting Co., Inc.* v. *FCC*, 395 U. S. 367 (1969), as well as the suggestion in *Hudgens* v. *NLRB*, 424 U. S. 507 (1976), that the Federal Government may grant employees a right of access to employer property for the purpose of picketing, even though the First Amendment does not guarantee such access. *Id.*, at 521–523.

SUPREME COURT OF THE UNITED STATES

No. 84-1044

PACIFIC GAS AND ELECTRIC COMPANY, APPELLANT *v.* PUBLIC UTILITIES COMMISSION OF CALIFORNIA ET AL.

ON APPEAL FROM THE SUPREME COURT OF CALIFORNIA

[February 25, 1986]

JUSTICE STEVENS, dissenting.

Because the plurality opinion is largely concerned with questions that need not be answered in order to decide this case,[1] I believe it is important to identify the actual issue with some care. The narrow question we must address is whether a state public utility commission may require the fund-raising solicitation of a consumer advocacy group to be carried in a utility billing envelope. Since the utility concedes that *it* has no right to use the extra space in the billing envelope for its own newsletter, the question is limited to whether the Commission's requirement that it be the courier for the message of a third party violates the First Amendment. In my view, this requirement differs little from regulations applied daily to a variety of commercial communications that have rarely been challenged—and to my knowledge never invalidated—on First Amendment grounds.

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[1] For the plurality, the question in this case is whether a public utility commission "may require a privately owned utility company to include in its billing envelopes speech of a third party with which the utility disagrees." *Ante*, at 1. The plurality seems concerned that the California Public Utility Commission's decision may be the harbinger of future decisions requiring publicly regulated institutions to bear banners antithetical to their own self-interest. Henceforth, a company's buildings and vehicles might display signs and stickers proclaiming the benefits of conservation, lower rates, and perhaps even government ownership. See *ante*, at 3, and n. 4, 12, and n. 12.

I

As the California Public Utilities Commission summarized its own ruling: "[T]his decision . . . grants, in modified form, the complaint of Toward Utility Rate Normalization (TURN) proposing access to the extra space in Pacific Gas and Electric Company's (PG&E) billing envelope by consumer representative organizations for the purpose of soliciting funds to be used for residential ratepayer representation in proceedings of this Commission involving PG&E." App. to Juris. Statement A–1. Accord, *id.*, at A–4.[2] The Commission did not select among competing advocacy groups yearning to reach residential ratepayers through the billing envelope; "no other ratepayer organizations . . . sought access to the extra space." *Id.*, at A–24.

In my view the propagandizing and sloganeering feared by the plurality is not authorized by paragraph 5(b) of the Commission's order, which provides that "PG&E and TURN shall each determine the content of [its] own material." *Id.*, at A–32. In context, it is clear that the limited editorial license afforded by that provision is confined to "a billing envelope extra space insert . . . which (1) explains the program, (2) sets forth a list of pending and anticipated PG&E applications and other cases likely to have a significant effect on customers' rates and services, and (3) invites voluntary donations to support advocacy by [TURN] on behalf of PG&E's residential customers before the Commission. The insert would also include a return envelope for mailing donations to a central collection point for transmittal to [TURN]." *Id.*, at A-4, A-5. It is unrealistic to suppose that the Commission, after adopting a program so detailed as to prescribe the subject matter of the communication and even to require return envelopes, can be thought to have sanctioned the free-wheeling political debate the plurality opinion presupposes. Far from creating the postal equivalent of the soap box in the park, the Commission "order[ed] that proposal 3" of the "Consumer Advocacy Checkoff" alternatives listed in TURN's complaint "be implemented." *Id.*, at A-17. Accord, *id.*, at A-31. That proposal, in marked contrast to the typically broad prayers for relief found in most complaints, limited the requested insert to the three matters described above, see *id.*, at A-78, and even provided a full illustrative insert as an exhibit, see *id.*, at A-85, A-86. Simply as a matter of construing a decision by a regulatory agency I find it difficult to understand the plurality's preference for discussing issues in their most abstract form. And as a matter of constitutional law there is surely no warrant for presuming that the Commission acted indiscriminately, insensitively, and without regard to the First Amendment questions raised by its access requirement. If any presumption is invoked, it should be that in favor of the regularity and constitutionality of governmental action, and the Commission's order should be construed narrowly as a consequence.

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[2] The Commission's access order is plainly limited to TURN's fund-raising appeal: Subsections (f) through (i) of paragraph 5 of the order, which make provision for funds received in response to TURN's solicitation, make no sense if TURN is not required to solicit funds. See App. to Juris. Statement A–32, A–33.

That the Commission is serious about this limitation is borne out by its denial of access to a group which did not itself wish to participate in Commission proceedings and which failed to allege that its use of the billing envelope would enhance consumer participation in Commission proceedings. See *ante*, at 4, n. 5.

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II

I assume that the plurality would not object to a utility commission rule dictating the format of the bill, even as to required warnings and the type size of various provisos and disclaimers.[3] Such regulation is not too different from that applicable to credit card bills, loan forms, and media advertising. See, *e. g.*, 15 U. S. C. § 1632(a); *id.*, § 1663; 12 CFR §§ 226.6–226.8, 226.10 (1985).[4] I assume also the plurality would permit the Commission to require the utility to disseminate legal notices of public hearings and ratemaking proceedings written by it. See *ante*, at 12, n. 12 (attempting to distinguish legal notices).[5] These compelled statements differ little from mandating disclosure of information in the bill itself, as the plurality recognizes.[6]

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[3] Since 1919 the predecessor to the California Public Utility Commission ordered that each electric bill reprint the regulations "regarding payment of bills, disputed bills and discontinuance of service." *Pacific Gas and*

Electric Co., 17 Decisions of the Railroad Comm'n. 143, 147 (1919). Other States have similar requirements.

[4] "Numerous examples could be cited of communications that are regulated without offending the First Amendment, such as the exchange of information about securities, *SEC* v. *Texas Gulf Sulphur Co.*, 401 F. 2d 833 (CA2 1968), cert. denied, 394 U. S. 976 (1969), corporate proxy statements, *Mills* v. *Electric Auto-Lite Co.*, 396 U. S. 375 (1970), [and] the exchange of price and production information among competitors, *American Column & Lumber Co.* v. *United States*, 257 U. S. 377 (1921)." *Ohralik* v. *Ohio State Bar Assn.*, 436 U. S. 447, 456 (1978).

[5] At various times the Commission has required that inserts be placed in billing envelopes to "explai[n] the reasons behind [a] gas rate increase," *Pacific Gas and Electric Co.*, 9 P. U. C. 2d 82, 94 (1982), and to "describe the components of utility costs," *San Diego Gas and Electric Co.*, 8 P. U.C. 2d 410, Decision No. 82–03–073 (1982) (slip op. 1, 2). See *Pacific Gas and Electric Co.*, 7 P. U. C. 2d 349, 518 (1981) ("By March 1, 1982, PG&E shall mail to all its customers a bill insert which describes the components of the utility's costs. The complete bill insert to be sent is given in Appendix G of this decision. Its size and form shall be approved by the Executive Director in writing prior to inclusion with any customer's bill.").

California has also enacted legislation requiring that utilities notify their customers of rate increases. These notices, which by statute must be included in utility bill envelopes, "shall state the amount of the proposed increase expressed in both dollar and percentage terms, a brief statement of the reasons the increase is required or sought, and the mailing address of the commission to which any customer inquiries relative to the proposed increase . . . may be directed." Cal. Public Utilities Code Ann. § 454(a) (West 1975). Other states likewise require certain service-related communications to be carried in a utility company's billing envelope.

[6] See *ante*, at 14–15 (the result in *Miami Herald Publishing Co.* v. *Tornillo*, 418 U. S. 241 (1974), would not differ if the forced reply had ap-

Given that the Commission can require the utility to make certain statements and to carry the Commission's own messages to its customers, it seems but a small step to acknowledge that the Commission can also require the utility to act as the conduit for a public interest group's message that bears a close relationship to the purpose of the billing envelope.[7] An analogue to this requirement appears in securities law: the Securities and Exchange Commission requires the incumbent board of directors to transmit proposals of dissident shareholders which it opposes.[8] Presumably the plurality does not doubt the constitutionality of the SEC's requirement under the First Amendment, and yet—although the analogy is far from perfect—it performs the same function as the Commission's rule by making accessible the relevant audience, whether it be shareholders investing in the corporation

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peared in a separate insert rather in the newspaper proper). See also *ante*, at 8, n. 7.

[7] Because TURN's purpose is to solicit funds to fight utility rate increases, the success of its appeal bears directly on the size of the bill which, after all, the billing envelope contains.

[8] 17 CFR § 240.14a–8 (1985). This regulation cannot be justified on the basis of the commercial character of the communication, because the Rule can and has been used to propagate purely political proposals. See, *e. g.*, *Medical Committee for Human Rights* v. *SEC*, 139 U. S. App. D. C. 226, 229, 432 F. 2d 659, 662 (1970) (shareholder proposal to stop sale of napalm in part because of use in Vietnam), vacated as moot, 401 U. S. 973 (1971). See generally, Weiss, Proxy Voting on Social Issues: A Growth Industry, Bus. and Soc'y Rev. 16 (Autumn 1974).

Even if the SEC Rule were justified largely on the basis of the commercial character of the communication, that justification is not irrelevant in this case. The messages that the utility disseminates in its newsletter are unquestionably intended to advance the corporation's commercial interests and its objections to the public interest groups messages are based on their potentially adverse impact on the utility's ability to obtain rate increases. These commercial factors do not justify an abridgment of the utility's constitutionally protected right to communicate in *its* newsletter, but they do provide a legitimate and an adequate justification for the Commission's action in giving TURN access to the same audience that receives the utility's newsletter.

or consumers served by the utility, to individuals or groups with demonstrable interests in reaching that audience for certain limited and approved purposes.

If the California Public Utility Commission had taken over company buildings and vehicles for propaganda purposes, or even engaged in viewpoint discrimination among speakers desirous of sending messages via the billing envelope, I would be concerned. But nothing in this case presents problems even remotely resembling or portending the ones just mentioned. Although the plurality's holding may wisely forestall serious constitutional problems that are likely to arise in the future, I am not convinced that the order under review today has crossed the threshold of unconstitutionality. Accordingly, I respectfully dissent.

Ju 6.8/b:985/84-1077

ORIGINAL

25

(Slip Opinion)

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Lumber Co.*, 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

165 392

Syllabus

WHITLEY, INDIVIDUALLY AND AS ASSISTANT SUPERINTENDENT, OREGON STATE PENITENTIARY, ET AL. *v.* ALBERS

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 84-1077. Argued December 10, 1985—Decided March 4, 1986

During the course of a riot at the Oregon State Penitentiary, a prison officer was taken hostage and placed in a cell on the upper tier of a two-tier cellblock. In an attempt to free the hostage, prison officials worked out a plan that called for the prisoner security manager to enter the cellblock unarmed, followed by prison officers armed with shotguns. The security manager ordered one of the officers to fire a warning shot and to shoot low at any inmates climbing the stairs to the upper tier since he would be climbing the stairs to free the hostage. One of the officers, after firing a warning shot, shot respondent in the left knee when he started up the stairs. Respondent subsequently brought an action in Federal District Court against petitioner prison officials pursuant to 42 U. S. C. § 1983, alleging, *inter alia*, that they had deprived him of his rights under the Eighth and Fourteenth Amendments. At the conclusion of the trial, the District Court directed a verdict for petitioners. The Court of Appeals reversed and remanded for a new trial on respondent's Eighth Amendment claim.

Held:

1. The shooting of respondent did not violate his Eighth Amendment right to be free from cruel and unusual punishments. Pp. 5–13.

(a) It is obduracy and wantonness, not inadvertence or error in good faith, that characterize the conduct prohibited by the Cruel and Unusual Punishments Clause, whether that conduct occurs in connection with establishing conditions of confinement, supplying medical needs, or restoring control over a tumultuous cellblock. The infliction of pain in the course of a prison security measure, therefore, does not amount to cruel and unusual punishment simply because it may appear in retrospect that the degree of force authorized or applied for security purposes was unreasonable, and hence unnecessary in the strict sense. The general requirement that an Eighth Amendment claimant establish the unnecessary and wanton infliction of pain should also be applied with due regard for differences in the kind of conduct involved. Thus, where a prison security measure is undertaken to resolve a disturbance, such as occurred in this case, that poses significant risks to the safety of inmates and prison staff, the question whether the measure taken inflicted unnecessary and wanton pain and suffering ultimately turns on whether force was applied in a good-faith effort to maintain or restore discipline or maliciously and sadistically for the purpose of causing harm. Pp. 5–9.

(b) Viewing the evidence in the light most favorable to respondent, as must be done in reviewing the decision reversing the trial court's directed verdict for petitioners, it does not appear that the evidence supports a reliable inference of wantonness in the infliction of pain under the above standard. Evidence arguably showing that the prison officials erred in judgment when they decided on a plan that employed potentially deadly force, falls far short of a showing that there was no plausible basis for their belief that this degree of force was necessary. In particular, the order to shoot, qualified by an instruction to shoot low, falls short of commanding the infliction of pain in a wanton and unnecessary fashion. Nor was the failure to provide for a verbal warning, in addition to a warning shot, so insupportable as to be wanton, since any inmate running up the stairs after the prison security manager could reasonably be thought to pose a threat to the rescue attempt. And the failure to take into account the possibility that respondent might climb the stairs in an effort to return to his cell does not rise to the level of an Eighth Amendment violation. Assuming that the prison officer shot at respondent rather than at the inmates as a group does not establish that the officer shot respondent knowing that it was unnecessary to do so. Under all these circumstances, the shooting was part and parcel of a good-faith effort to restore prison security. Pp. 9–13.

2. In this case, the Due Process Clause of the Fourteenth Amendment cannot serve as an alternative basis for affirmance, independently of the Eighth Amendment. In the prison security context, the Due Process Clause affords respondent no greater protection than does the Cruel and Unusual Punishments Clause. Pp. 13–14.

743 F. 2d 1372, reversed.

O'CONNOR, J., delivered the opinion of the Court, in which BURGER, C. J., and WHITE, POWELL, and REHNQUIST, JJ., joined. MARSHALL, J., filed a dissenting opinion, in which **Brennan**, **Blackmun**, and **Stevens**, JJ., joined.

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D. C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

No. 84-1077

HAROL WHITLEY, INDIVIDUALLY AND AS ASSISTANT SUPERINTENDENT, OREGON STATE PENITENTIARY, ET AL., PETITIONERS *v.* GERALD ALBERS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

[March 4, 1986]

JUSTICE O'CONNOR delivered the opinion of the Court.

This case requires us to decide what standard governs a prison inmate's claim that prison officials subjected him to cruel and unusual punishment by shooting him during the course of their attempt to quell a prison riot.

I

At the time he was injured, respondent Gerald Albers was confined in cellblock "A" of the Oregon State Penitentiary. Cellblock "A" consists of two tiers of barred cells housing some 200 inmates. The two tiers are connected by a stairway that offers the only practical way to move from one tier to another.

At about 8:30 on the evening of June 27, 1980, several inmates were found intoxicated at the prison annex. Prison guards attempted to move the intoxicated prisoners, some of whom resisted, to the penitentiary's isolation and segregation facility. This incident could be seen from the cell windows in cellblock "A", and some of the onlookers became agitated because they thought that the guards were using unnecessary force. Acting on instructions from their superiors, Officers Kemper and Fitts, who were on duty in cellblock "A", ordered the prisoners to return to their cells. The order was not obeyed. Several inmates confronted the two officers, who were standing in the open area of the lower tier. One inmate, Richard Klenk, jumped from the second tier and assaulted Officer Kemper. Kemper escaped but Officer Fitts was taken hostage. Klenk and other inmates then began breaking furniture and milling about.

Upon being informed of the disturbance, petitioner Harol Whitley, the prison security manager, entered cellblock "A" and spoke with Klenk. Captain Whitley agreed to permit four residents of cellblock "A" to view the inmates who had been taken to segregation earlier. These emissaries reported back that the prisoners in segregation were intoxicated but unharmed. Nonetheless, the disturbance in cellblock "A" continued.

Whitley returned to the cellblock and confirmed that Fitts was not harmed. Shortly thereafter, Fitts was moved from an office on the lower tier to cell 201 on the upper tier, and Klenk demanded that media representatives be brought into the cellblock. In the course of the negotiations, Klenk, who was armed with a homemade knife, informed Whitley that one inmate had already been killed and other deaths would follow. In fact, an inmate had been beaten but not killed by other prisoners.

Captain Whitley left the cellblock to organize an assault squad. When Whitley returned to cellblock "A", he was taken to see Fitts in cell 201. Several inmates assured Whitley that they would protect Fitts from harm, but Klenk threatened to kill the hostage if an attempt was made to lead an assault. Klenk and at least some other inmates were aware that guards had assembled outside the cellblock and that shotguns had been issued. Meanwhile, respondent had left his cell on the upper tier to see if elderly prisoners housed on the lower tier could be moved out of harm's way in the event that tear gas was used. Respondent testified that he asked Whitley for the key to the row of cells housing the elderly prisoners, and Whitley indicated that he would return with the key. Whitley denied that he spoke to respondent at any time during the disturbance. Tr. 380.

Whitley next consulted with his superiors, petitioners Cupp, the prison superintendant, and Kenney, the assistant superintendant. They agreed that forceful intervention was necessary to protect the life of the hostage and the safety of the inmates who were not rioting, and ruled out tear gas as an unworkable alternative. Cupp ordered Whitley to take a squad armed with shotguns into cellblock "A".

Whitley gave the final orders to the assault team, which was assembled in the area outside cellblock "A". Petitioner Kennicott and two other officers armed with shotguns were to follow Whitley, who was unarmed, over the barricade the inmates had constructed at the cellblock entrance. A second group of officers, without firearms, would be behind them. Whitley ordered Kennicott to fire a warning shot as he crossed the barricade. He also ordered Kennicott to shoot low at any prisoners climbing the stairs toward cell 201, since they could pose a threat to the safety of the hostage or to Whitley himself, who would be climbing the stairs in an attempt to free the hostage in cell 201.

At about 10:30 p.m., Whitley reappeared just outside the barricade. By this time, about a half hour had elapsed since the earlier breaking of furniture, and the noise level in the cellblock had noticeably diminished. Respondent, who was standing at the bottom of the stairway, asked about the key. Whitley replied "No," clambered over the barricade, yelled "shoot the bastards," and ran toward the stairs after Klenk, who had been standing in the open areaway along with a number of other inmates. Kennicott fired a warning shot into the wall opposite the cellblock entrance as he followed Whitley over the barricade. He then fired a second shot that struck a post near the stairway. Meanwhile, Whitley chased Klenk up the stairs, and shortly thereafter respondent started up the stairs. Kennicott fired a third shot that struck respondent in the left knee. Another inmate was shot on the stairs and several others on the lower tier were wounded by gunshot. The inmates in cell 201 prevented Klenk from entering, and Whitley subdued Klenk at the cell door, freeing the hostage.

As a result of the incident, respondent sustained severe damage to his left leg and mental and emotional distress. He subsequently commenced this action pursuant to 42 U. S. C. § 1983, alleging that petitioners deprived him of his rights under the Eighth and Fourteenth Amendments and raising pendent state law claims for assault and battery and negligence. Many of the facts were stipulated, see Tr. 53–60, but both sides also presented testimony from witnesses to the disturbance and the rescue attempt, as well as from expert witnesses with backgrounds in prison discipline and security. At the conclusion of trial, the District Judge directed a verdict for petitioners. He understood respondent's claim to be based solely on the Eighth Amendment as made applicable to the States by the Fourteenth Amendment. See *Robinson* v. *California*, 370 U. S. 660 (1962). The District Judge held:

> "[D]efendants' use of deadly force was justified under the unique circumstances of this case. Possible alternatives were considered and reasonably rejected by prison officers. The use of shotguns and specifically the order to shoot low anyone following the unarmed Whitley up the stairs were necessary to protect Whitley, secure the safe release of the hostage and to restore order and discipline. Even in hindsight, it cannot be said that defendants' actions were not reasonably necessary." 546 F. Supp. 726, 735 (Ore. 1982).

In the alternative, he held that petitioners were immune from damages liability because the constitutional constraints on the use of force in a prison riot were not clearly established. Finally, the District Judge held that respondent was barred from recovery on his pendent state law claims by virtue of an immunity conferred on public officers by the Oregon

Tort Claims Act as to claims arising out of riots or mob actions.

A panel of the Court of Appeals for the Ninth Circuit reversed, with one judge dissenting. 743 F. 2d 1372 (1984). The court held that an Eighth Amendment violation would be established "if a prison official deliberately shot Albers under circumstances where the official, with due allowance for the exigency, knew or should have known that it was unnecessary," *id.*, at 1375, or "if the emergency plan was adopted or carried out with 'deliberate indifference' to the right of Albers to be free of cruel unusual punishment." *Ibid.* The Court of Appeals pointed to evidence that the general disturbance in cellblock "A" was subsiding and to respondent's experts' testimony that the use of deadly force was excessive under the circumstances and should have been preceded by a verbal warning, and concluded that the jury could have found an Eighth Amendment violation. *Id.*, at 1376.

The Court of Appeals also ruled that petitioners could not prevail on their qualified immunity defense, because "[a] finding of deliberate indifference is inconsistent with a finding of good faith or qualified immunity." *Ibid.* Accordingly, the court remanded for a new trial on respondent's Eighth Amendment claim, while agreeing with the District Judge that respondent could not prevail on his state law claims, *id.*, at 1377, and that he had not asserted an independent violation of the Fourteenth Amendment. *Id.*, at 1374, n. 1. We granted certiorari, 472 U. S. —— (1985), and now reverse.

II

The language of the Eighth Amendment, "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted," manifests "an intention to limit the power of those entrusted with the criminal-law function of government." *Ingraham* v. *Wright*, 430 U. S. 651, 664 (1977). The Cruel and Unusual Punishments Clause "was designed to protect those convicted of crimes," *ibid.*, and consequently the Clause applies "only after the State has complied with the constitutional guarantees traditionally associated with criminal prosecutions." *Id.*, at 671 n. 40. See also *Revere* v. *Massachusetts General Hospital*, 463 U. S. 239, 244 (1983); *Bell* v. *Wolfish*, 441 U. S. 520, 535, n. 16 (1979). An express intent to inflict unnecessary pain is not required, *Estelle* v. *Gamble*, 429 U. S. 97, 104 (1976) ("deliberate indifference" to a prisoner's serious medical needs is cruel and unusual punishment), and "conditions of confinement" may constitute cruel and unusual punishment because such conditions "are part of the penalty that criminal offenders pay for their offenses against society." *Rhodes* v. *Chapman*, 452 U. S. 337, 347 (1981).

Not every governmental action affecting the interests or well-being of a prisoner is subject to Eighth Amendment scrutiny, however. "After incarceration, only the 'unnecessary and wanton infliction of pain' . . . constitutes cruel and unusual punishment forbidden by the Eighth Amendment." *Ingraham* v. *Wright*, *supra*, at 670 (quoting *Estelle* v. *Gamble*, *supra*, at 103) (citations omitted). To be cruel and unusual punishment, conduct that does not purport to be punishment at all must involve more than ordinary lack of due care for the prisoner's interests or safety. This reading of the Clause underlies our decision in *Estelle* v. *Gamble*, *supra*, at 105–106, which held that a prison physician's "neglige[ce] in diagnosing or treating a medical condition" did not suffice to make out a claim of cruel and unusual punishment. It is obduracy and wantonness, not inadvertence or error in good faith, that characterize the conduct prohibited by the Cruel and Unusual Punishments Clause, whether that conduct occurs in connection with establishing conditions of confinement, supplying medical needs, or restoring official control over a tumultuous cellblock. The infliction of pain in the course of a prison security measure, therefore, does not amount to cruel and unusual punishment simply because it may appear in retrospect that the degree of force authorized or applied for security purposes was unreasonable, and hence unnecessary in the strict sense.

The general requirement that an Eighth Amendment claimant allege and prove the unnecessary and wanton infliction of pain should also be applied with due regard for differences in the kind of conduct against which an Eighth Amendment objection is lodged. The deliberate indifference standard articulated in *Estelle* was appropriate in the context presented in that case because the State's responsibility to attend to the medical needs of prisoners does not ordinarily clash with other equally important governmental responsibilities. Consequently, "deliberate indifference to a prisoner's serious illness or injury," *Estelle, supra*, at 105, can typically be established or disproved without the necessity of balancing competing institutional concerns for the safety of prison staff or other inmates. But, in making and carrying out decisions involving the use of force to restore order in the face of a prison disturbance, prison officials undoubtedly must take into account the very real threats the unrest presents to inmates and prison officials alike, in addition to the possible harms to inmates against whom force might be used. As we said in *Hudson* v. *Palmer*, 468 U. S. ——, —— (1984), prison administrators are charged with the responsibility of ensuring the safety of the prison staff, administrative personnel, and visitors, as well as the "obligation to take reasonable measures to guarantee the safety of the inmates themselves." In this setting, a deliberate indifference standard does not adequately capture the importance of such competing obligations, or convey the appropriate hesitancy to critique in hindsight decisions necessarily made in haste, under pressure, and frequently without the luxury of a second chance.

Where a prison security measure is undertaken to resolve a disturbance, such as occurred in this case, that indisputably poses significant risks to the safety of inmates and prison staff, we think the question whether the measure taken inflicted unnecessary and wanton pain and suffering ultimately turns on "whether force was applied in a good faith effort to maintain or restore discipline or maliciously and sadistically for the very purpose of causing harm." *Johnson* v. *Glick*, 481 F. 2d 1028, 1033 (CA2) (Friendly, J.), cert. denied *sub nom John* v. *Johnson*, 414 U. S. 1033 (1973). As the District Judge correctly perceived, "such factors as the need for the application of force, the relationship between the need and the amount of force that was used, [and] the extent of injury inflicted," *ibid.*, are relevant to that ultimate determination. From such considerations inferences may be drawn as to whether the use of force could plausibly have been thought necessary, or instead evinced such wantonness with respect to the unjustified infliction of harm as is tantamount to a knowing willingness that it occur. See *Duckworth* v. *Franzen*, —— F. 2d ——, ——, slip op., at 12 (CA7 1985) (equating "deliberate indifference", in an Eighth Amendment case involving security risks, with "recklessness in criminal law," which "implies an act so dangerous that the defendant's knowledge of the risk can be inferred"); cf. *Block* v. *Rutherford*, 468 U. S. ——, —— (1984) (requiring pretrial detainees claiming that they were subjected to "punishment" without due process to prove intent to punish or show that the challenged conduct is not "reasonably related to a legitimate goal," from which an intent to punish may be inferred); *Bell* v. *Wolfish*, *supra*, at 539. But equally relevant are such factors as the extent of the threat to the safety of staff and inmates, as reasonably perceived by the responsible officials on the basis of the facts known to them, and any efforts made to temper the severity of a forceful response.

When the "ever-present potential for violent confrontation and conflagration," *Jones* v. *North Carolina Prisoners' Labor Union, Inc.*, 433 U. S. 119, 132 (1977), ripens into *actual* unrest and conflict, the admonition that "a prison's internal security is peculiarly a matter normally left to the discretion of prison administrators," *Rhodes* v. *Chapman*, 452 U. S., at 349, n. 14, carries special weight. "Prison administrators . . . should be accorded wide-ranging deference in the adoption and execution of policies and practices that in their judgment are needed to preserve internal order and discipline and to maintain institutional security." *Bell* v. *Wolfish*, 441 U. S., at 547. That deference extends to a prison security measure taken in response to an actual confrontation with riotous inmates, just as it does to prophylactic or preventive measures intended to reduce the incidence of these or any other breaches of prison discipline. It does not insulate from review actions taken in bad faith and for no legitimate purpose, but it requires that neither judge nor jury freely substitute their judgment for that of officials who have made a considered choice. Accordingly, in ruling on a motion for a directed verdict in a case such as this, courts must determine whether the evidence goes beyond a mere dispute over the reasonableness of a particular use of force or the existence of arguably superior alternatives. Unless it appears that the evidence, viewed in the light most favorable to the plaintiff, will support a reliable inference of wantonness in the infliction of pain under the standard we have described, the case should not go to the jury.

III

Since this case comes to us from a decision of the Court of Appeals reversing the District Court's directed verdict for petitioners, we evaluate the facts in the light most favorable to respondent. The Court of Appeals believed that testimony that the disturbance was subsiding at the time the assault was made, and the conflicting expert testimony as to whether the force used was excessive, were enough to allow a jury to find that respondent's Eighth Amendment rights were violated. We think the Court of Appeals effectively collapsed the distinction between mere negligence and wanton conduct that we find implicit in the Eighth Amendment. Only if ordinary errors of judgment could make out an Eighth Amendment claim would this evidence create a jury question.

To begin with, although the evidence could be taken to show that the general disturbance had quieted down, a guard was still held hostage, Klenk was armed and threatening, several other inmates were armed with homemade clubs, numerous inmates remained outside their cells, and the cellblock remained in the control of the inmates. The situation remained dangerous and volatile. As respondent concedes, at the time he was shot "an officer's safety was in question and . . . an inmate was armed and dangerous." Brief for Respondent 25. Prison officials had no way of knowing what direction matters would take if they continued to negotiate or did nothing, but they had ample reason to believe that these options presented unacceptable risks.

Respondent's expert testimony is likewise unavailing. One of respondent's experts opined that petitioners gave inadequate consideration to less forceful means of intervention, and that the use of deadly force under the circumstances was not necessary to "prevent imminent danger" to the hostage guard or other inmates. Tr. 266. Respondent's second expert testified that prison officials were "possibly a little hasty in using the firepower" on the inmates. Tr. 314. At most, this evidence, which was controverted by petitioners' experts, establishes that prison officials arguably erred in judgment when they decided on a plan that employed potentially deadly force. It falls far short of a showing that there was no plausible basis for the officials' belief that this degree of force was necessary. Indeed, any such conclusion would run counter to common sense, in light of the risks to the life of the hostage and the safety of inmates that demonstrably persisted notwithstanding repeated attempts to defuse the situation. An expert's after-the-fact opinion that danger was not "imminent" in no way establishes that there was no danger, or that a conclusion by the officers that it *was* imminent would have been wholly unreasonable.

Once the basic design of the plan was in place, moreover, it is apparent why any inmate running up the stairs after Captain Whitley, or interfering with his progress towards the hostage, could reasonably be thought to present a threat to the success of the rescue attempt and to Whitley—particularly after a warning shot was fired. A sizable group of inmates, in defiance of the cell-in order and in apparent support of Klenk, continued to stand in the open area on the lower tier. Respondent testified that this was not "an organized group," Tr. 113, and that he saw no inmates armed with clubs in that area. Tr. 114. But the fact remains that the officials had no way of knowing which members of that group of inmates had joined with Klenk in destroying furniture, breaking glass, seizing the hostage, and setting up the barricade, and they certainly had reason to believe that some members of this group might intervene in support of Klenk. It was perhaps also foreseeable that one or more of these inmates would run up the stairs after the shooting started in order to return to their cells. But there would be neither means nor time to inquire into the reasons why each inmate acted as he did. Consequently, the order to shoot, qualified as it was by an instruction to shoot low, falls short of commanding the infliction of pain in a wanton and unnecessary fashion.

As petitioners' own experts conceded, a verbal warning would have been desirable, in addition to a warning shot, if circumstances permitted it to be given without undue risk. See Tr. 446, 556. While a jury might conclude that this omission was unreasonable, we think that an inference of wantonness could not properly be drawn. First, some warning was given in the form of the first shot fired by Officer Kennicott. Second, the prison officials could have believed in good faith that such a warning might endanger the success of the security measure because of the risk that it would have allowed one or more inmates to climb the stairs before they could be stopped. The failure to provide for verbal warnings is thus not so insupportable as to be wanton. Accordingly, a jury could not properly find that this omission, coupled with the order to shoot, offended the Eighth Amendment.

To be sure, the plan was not adapted to take into account the appearance of respondent on the scene, and, on the facts as we must take them, Whitley was aware that respondent was present on the first tier for benign reasons. Conceivably, Whitley could have added a proviso exempting respondent from his order to shoot any prisoner climbing the stairs. But such an oversight simply does not rise to the level of an Eighth Amendment violation. Officials cannot realistically be expected to consider every contingency or minimize every risk, and it was far from inevitable that respondent would react as he did. Whitley was about to risk his life in an effort to rescue the hostage, and he was understandably focusing on the orders essential to the success of the plan. His failure to make special provision for respondent may have been unfortunate, but is hardly behavior from which a wanton willingness to inflict unjustified suffering on respondent can be inferred.

Once it is established that the order to shoot low at anyone climbing the stairs after a warning shot was not wanton, respondent's burden in showing that the actual shooting constituted the wanton and unnecessary infliction of pain is an extremely heavy one. Accepting that respondent could not have sought safety in a cell on the lower tier, the fact remains that had respondent thrown himself to the floor he would not have been shot at. Instead, after the warning shot was fired, he attempted to return to his cell by running up the stairs behind Whitley. That is equivocal conduct. While respondent had not been actively involved in the riot and indeed had attempted to help matters, there is no indication that Officer Kennicott knew this, nor any claim that he acted vindictively or in retaliation. Respondent testified that as he started to run up the stairs he "froze" when he looked to his left and saw Kennicott, and that "we locked eyes." Tr. 119. Kennicott testified that he saw several inmates running up the stairs, that he thought they were pursuing Whitley, and that he fired at their legs. Tr. 459. To the extent that this testimony is conflicting, we resolve the conflict in respondent's favor by assuming that Kennicott shot at respondent rather than at the inmates as a group. But this does not establish that Kennicott shot respondent knowing it was unnecessary to do so. Kennicott had some basis for believing that respondent constituted a threat to the hostage and to Whitley, and had at most a few seconds in which to react. He was also under orders to respond to such a perceived threat in precisely the manner he did. Under these circumstances, the actual shooting was part and parcel of a good faith effort to restore prison security. As such, it did not violate respondent's Eighth Amendment right to be free from cruel and unusual punishments.

IV

As an alternative ground for affirmance, respondent contends that, independently of the Eighth Amendment, the shooting deprived him of a protected liberty interest without due process of law, in violation of the Fourteenth Amendment. Respondent correctly observes that any ground properly raised below may be urged as a basis for affirmance of the Court of Appeals' decision, see *United States* v. *New York Telephone Co.*, 434 U. S. 159, 166, n. 8 (1977), and argues that he has maintained throughout this litigation that his "constitutional protection against the use of excessive and unnecessary force, as well as the use of deadly force without meaningful warning," derives from the Due Process Clause as well as the Eighth Amendment. Brief for Respondent 25, n. 13.

The District Court was correct in ruling that respondent did not assert a *procedural* due process claim that the State was obliged to afford him some kind of hearing either before or after he was shot. See 546 F. Supp. at 732, n. 1. But we believe respondent did raise a claim that his "substantive rights under the Due Process Clause of the Fourteenth Amendment," *Youngberg* v. *Romeo*, 457 U. S. 307, 309

(1982), were infringed by prison officials when he was shot. His complaint alleged violations of the Eighth and Fourteenth Amendments, App. 2, 7 (First Amended Complaint), and at argument on petitioners' motion for a directed verdict, counsel for both petitioners and respondents treated the Fourteenth Amendment as a distinct though overlapping source of substantive protection from state action involving excessive force. See App. 21, 27. Accordingly, we consider whether the Due Process Clause could serve as an alternative basis for affirmance.

We need say little on this score. We think the Eighth Amendment, which is specifically concerned with the unnecessary and wanton infliction of pain in penal institutions, serves as the primary source of substantive protection to convicted prisoners in cases such as this one, where the deliberate use of force is challenged as excessive and unjustified. It would indeed be surprising if, in the context of forceful prison security measures, "conduct that shocks the conscience" or "afford[s] brutality the cloak of law," and so violates the Fourteenth Amendment, *Rochin* v. *California*, 342 U. S. 165, 172, 173 (1952), were not also punishment "inconsistent with contemporary standards of decency" and "'repugnant to the conscience of mankind,'" *Estelle* v. *Gamble*, 429 U. S., at 103, 106, in violation of the Eighth. We only recently reserved the general question "whether something less than intentional conduct, such as recklessness or 'gross negligence,' is enough to trigger the protections of the Due Process Clause." *Daniels* v. *Williams*, —— U. S. ——, —— n. 3 (1986) (slip. op. p. 7). Because this case involves prison inmates rather than pretrial detainees or persons enjoying unrestricted liberty we imply nothing as to the proper answer to that question outside the prison security context by holding, as we do, that in these circumstances the Due Process Clause affords respondent no greater protection than does the Cruel and Unusual Punishments Clause.

Petitioners also ask us to hold that the Court of Appeals erred in ruling that they did not enjoy qualified immunity. We decline to review that holding, because our decision that petitioners were entitled to a directed verdict on the merits makes it unnecessary to do so.

The judgment of the Court of Appeals is

Reversed.

SUPREME COURT OF THE UNITED STATES

No. 84-1077

HAROL WHITLEY, INDIVIDUALLY AND AS ASSISTANT SUPERINTENDENT, OREGON STATE PENITENTIARY, ET AL., PETITIONERS *v.* GERALD ALBERS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

[March 4, 1986]

JUSTICE MARSHALL, with whom JUSTICE BRENNAN, JUSTICE BLACKMUN, and JUSTICE STEVENS join, dissenting.

I share the majority's concern that prison officials be permitted to respond reasonably to inmate disturbances without unwarranted fear of liability. I agree that the threshold for establishing a constitutional violation under these circumstances is high. I do not agree, however, that the contested existence of a "riot" in the prison lessens the constraints imposed on prison authorities by the Eighth Amendment.

The majority has erred, I believe, both in developing its legal analysis and in employing it. First, the especially onerous standard the Court has devised for determining whether a prisoner injured during a prison disturbance has been subjected to cruel and unusual punishment is incorrect and not justified by precedent. That standard is particularly inappropriate because courts deciding whether to apply it must resolve a preliminary issue of fact that will often be disputed and properly left to the jury. Finally, the Court has applied its test improperly to the facts of this case. For these reasons, I must respectfully dissent.

I

The Court properly begins by acknowledging that, for a prisoner attempting to prove a violation of the Eighth

Amendment, "[a]n express intent to inflict unnecessary pain is not required, *Estelle* v. *Gamble*, 429 U. S. 97, 104 (1976)." *Ante*, at 6. Rather, our cases have established that the "unnecessary and wanton" infliction of pain on prisoners constitutes cruel and unusual punishment prohibited by the Eighth Amendment, even in the absence of intent to harm. *Ibid.*; see also *Ingraham* v. *Wright*, 430 U. S. 651, 670 (1977); *Gregg* v. *Georgia*, 428 U. S. 153, 173 (1976) (joint opinion of Stewart, POWELL, and STEVENS, JJ.). Having correctly articulated the teaching of our cases on this issue, however, the majority inexplicably arrives at the conclusion that a constitutional violation in the context of a prison uprising can be established only if force was used "maliciously and sadistically for the very purpose of causing harm," *ante*, at 7–8—thus requiring the very "express intent to inflict unnecessary pain" that it had properly disavowed.[1]

The Court imposes its heightened version of the "unnecessary and wanton" standard only when the injury occurred in the course of a "disturbance" that "poses significant risks," *ante*, at 7. But those very questions—whether a disturbance existed and whether it posed a risk—are likely to be hotly contested. It is inappropriate, to say the least, to condition the choice of a legal standard, the purpose of which is to determine whether to send a constitutional claim to the jury, upon the court's resolution of factual disputes that in many cases should themselves be resolved by the jury.

The correct standard for identifying a violation of the Eighth Amendment under our cases is clearly the "unnecessary and wanton" standard, which establishes a high hurdle to be overcome by a prisoner seeking relief for a constitutional violation. The full circumstances of the plaintiff's injury, including whether it was inflicted during an attempt to quell a riot and whether there was a reasonable apprehension of danger, should be considered by the factfinder in determining whether that standard is satisfied in a particular case. There is simply no justification for creating a distinct and more onerous burden for the plaintiff to meet merely because the judge believes that the injury at issue was caused during a disturbance that "pose[d] significant risks to the safety of inmates and prison staff," *ante*, at 7. Determination of whether there was such a disturbance or risk, when disputed, should be made by the jury when it resolves disputed facts, not by the court in its role as arbiter of law. See *Byrd* v. *Blue Ridge Cooperative*, 356 U. S. 525, 537 (1958).

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[1] This intent standard ostensibly derives from an opinion of Judge Friendly in *Johnson* v. *Glick*, 481 F. 2d 1028, 1033 (CA2), cert. denied *sub nom. John* v. *Johnson*, 414 U. S. 1033 (1973). That opinion, however, considered maliciousness not as a prerequisite to a constitutional violation, but rather as a factor that, if present, could enable a plaintiff to survive a motion to dismiss when otherwise the facts might be insufficient to make out a claim. 481 F. 2d, at 1033.

II

The Court properly begins its application of the law by reciting the principle that the facts must be viewed in the light most favorable to respondent, who won a reversal of a directed verdict below. See *Galloway* v. *United States*, 319 U. S. 372, 395 (1943). If, under any reasonable interpretation of the facts, a jury could have found the "unnecessary and wanton" standard to be met, then the directed verdict was improper. The majority opinion, however, resolves factual disputes in the record in petitioners' favor and discounts much of respondent's theory of the case. This it is not entitled to do.

The majority pays short shrift to respondent's significant contention that the disturbance had quieted down by the time the lethal force was employed. *Ante*, at 9. Respondent presented substantial testimony to show that the disturbance had subsided, Tr. 112, 165, 188, 193; that only one prisoner, Klenk, remained in any way disruptive, *id.*, at 212; and that even Klenk had calmed down enough at that point to admit that he had "'gone too far.'" *Id.*, at 117. The majority asserts that "a guard was still held hostage, Klenk was armed and threatening, several other inmates were armed with homemade clubs, numerous inmates remained outside their cells, and . . . [t]he situation remained dangerous and volatile." *Ante*, at 10. Respondent's evidence, however, indicated that the guard was not, in fact, in danger. He had been put into a cell by several inmates to prevent Klenk from harming him. Tr. 161. Captain Whitley had been to see the guard, and had observed that the inmates protecting him from Klenk were not armed and had promised to keep Klenk out. *Id.*, at 58 (stipulation), 163. According to respondent's evidence, moreover, no other inmates were assisting Klenk in any way when the riot squad was called in; they were simply "milling around," waiting for Klenk to be taken into custody, or for orders to return to their cells. *Id.*, at 188. Respondent's evidence tended to show not that the "situation remained dangerous and volatile," *ante*, at 10, but, on the contrary, that it was calm. Although the Court sees fit to emphasize repeatedly "the risks to the life of the hostage and the safety of inmates that demonstrably persisted notwithstanding repeated attempts to defuse the situation," *ibid.*, I can only point out that respondent bitterly disputed that any such risk to guards or inmates had persisted. The Court just does not believe his story.

The Court's treatment of the expert testimony is equally insensitive to its obligation to resolve all disputes in favor of respondent. Respondent's experts testified that the use of deadly force under these circumstances was not justified by any necessity to prevent imminent danger to the officers or the inmates, Tr. 266; that the force used was excessive, *ibid.*; and that even if deadly force had been justified, it would have been unreasonable to unleash such force without a clear warning to allow non-participating inmates to return to their cells. *Id.*, at 269. Insofar as expert testimony can ever be useful to show that prison authorities engaged in the "unnecessary and wanton" infliction of pain, even though it will always amount to "after-the-fact opinion" regarding the circumstances of the injury, see *ante*, at 10, respondent's expert evidence contributed to the creation of a factual issue.

The majority characterizes the petitioners' error in using deadly force where it was not justified as an "oversight." *Ante*, at 12. This is an endorsement of petitioners' rendition of the facts. As portrayed by respondent's evidence, the "error" was made in cold blood. Respondent's involvement started when, at the request of one of the inmates, he approached petitioner Whitley, who was talking to Klenk, to ask if Whitley would supply a key to a gate so that the elderly and sick patients in so-called "medical cells" near the area of disturbance could be removed before any tear gas was used. Tr. 115–116. Captain Whitley said that he would go and get the key, and left the cellblock. *Ibid.* In two or three minutes, Whitley returned. *Id.*, at 118. Respondent went to the door of the cellblock, and asked Whitley if he had brought the key. Whitley responded "'No,'" turned his head back and yelled, "'Let's go, let's go. Shoot the bastards!'" *Ibid.*

Respondent, afraid, ran from his position by the door and headed for the stairs, the only route back to his cell. *Id.*, at 118–119. He caught some movement out of the corner of his eye, looked in its direction, and saw petitioner Kennicott. According to respondent, "'I froze. I looked at him; we locked eyes, then I looked down and seen the shotgun in his hand, then I seen the flash, and the next thing I know I was sitting down, grabbing my leg.'" *Id.*, at 119. Losing a great deal of blood, respondent crawled up the stairs and fell on his face, trying to get out of range of the shotguns. *Ibid.* After about 10 minutes, an officer grabbed respondent by the hair and dragged him downstairs. *Id.*, at 194. As he lay there, another officer came and stood over respondent and shoved the barrel of a gun or gas pistol into respondent's face. *Id.*, at 122. Respondent was left lying and bleeding profusely for approximately 10 or 15 more minutes, and was then taken to the prison hospital. *Id.*, at 194. He suffered very severe injury. Meanwhile, Klenk had been subdued with no resistance by Whitley, *id.*, at 164, 234, who was unarmed, *id.*, at 233.

Other testimony showed that, although most of the inmates assembled in the area were clearly not participating in the misconduct, they received no warning, instructions, or opportunity to leave the area and return to their cells before the officers started shooting. *Id.*, at 163. Neither respondent nor any other inmate attempted to impede the officers as they entered the cellblock. *Id.*, at 234. The officers were described as "wild," "agitated, excited," not in full control of their emotions. *Id.*, at 192. One officer, prior to entering Cellblock A, told the others to "'shoot their asses off, and if Klenk gets in the way, kill him.'" *Ibid.* At the time of this assault, the cellblock was described as "quiet." *Id.*, at 193.

If a jury credited respondent's testimony and that of his witnesses, it would have believed that there was only one inmate who was temporarily out of control, Klenk—"scared," *id.*, at 165, and "high," *id.*, at 117—and ready to give up. The disturbance in the block had lasted only 15 or 20 minutes when it subsided, and there appeared to be no lasting danger to anyone. Respondent was shot while he stood motionless on the stairs, and was left to bleed for a perilously long time before receiving any assistance.

III

Part III of the Court's opinion falls far short of a rendition of the events in the light most favorable to respondent. In that light, the facts present a very close question as to whether the prison officials' infliction of pain on respondent could be said to display the level of wantonness necessary to make out a constitutional violation. At the very least, it is clear that fair-minded people could differ on the response to that question, and that is all it takes to preclude a directed verdict.

The majority suggests that the existence of more appropriate alternative measures for controlling prison disturbances is irrelevant to the constitutional inquiry, but surely it cannot mean what it appears to say. For if prison officials were to drop a bomb on a cellblock in order to halt a fistfight between two inmates, for example, I feel confident that the Court would have difficulty concluding, as a matter of law, that such an action was not sufficiently wanton to present a jury question, even though concededly taken in an effort to restore order in the prison. Thus, the question of wantonness in the context of prison disorder, as with other claims of mistreatment under the Eighth Amendment, is a matter of degree. And it is precisely in cases like this one, when shading the facts one way or the other can result in different legal conclusions, that a jury should be permitted to do its job. Properly instructed, a jury would take into account the petitioners' legitimate need to protect security, the extent of the danger presented, and the reasonableness of force used, in assessing liability. Moreover, the jury would know that a prisoner's burden is a heavy one, if he is to establish an Eighth Amendment violation under these circumstances.[2] Whether respondent was able to meet that burden here is a question for the jury. From the Court's usurpation of the jury's function, I dissent. I would affirm the judgment of the Court of Appeals.

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[2] The majority also rejects the pure Fourteenth Amendment due process claim asserted by respondent before the District Court. For the reasons stated in JUSTICE BLACKMUN's dissent in *Davidson* v. *Cannon*, 474 U. S. ——, —— (1986), which I joined, I believe that the evidence precluding a directed verdict under the "unnecessary and wanton" standard also precludes directed verdict on respondent's due process claim. JUSTICE STEVENS does not join this footnote.

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(Slip Opinion)

COMPLETED

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NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Lumber Co.*, 200 U. S. 321, 337.

ORIGINAL

SUPREME COURT OF THE UNITED STATES

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Syllabus

GOLDMAN *v.* WEINBERGER, SECRETARY OF DEFENSE, ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 84–1097. Argued January 14, 1986—Decided March 25, 1986

Petitioner, an Orthodox Jew and ordained rabbi, was ordered not to wear a yarmulke while on duty and in uniform as a commissioned officer in the Air Force at March Air Force Base, pursuant to an Air Force regulation that provides that authorized headgear may be worn out of doors but that indoors "[h]eadgear [may] not be worn . . . except by armed security police in the performance of their duties." Petitioner then brought an action in Federal District Court, claiming that the application of the regulation to prevent him from wearing his yarmulke infringed upon his First Amendment freedom to exercise his religious beliefs. The District Court permanently enjoined the Air Force from enforcing the regulation against petitioner. The Court of Appeals reversed.

Held: The First Amendment does not prohibit the challenged regulation from being applied to petitioner even though its effect is to restrict the wearing of the headgear required by his religious beliefs. That Amendment does not require the military to accommodate such practices as wearing a yarmulke in the face of its view that they would detract from the uniformity sought by dress regulations. Here, the Air Force has drawn the line essentially between religious apparel that is visible and that which is not, and the challenged regulation reasonably and evenhandedly regulates dress in the interest of the military's perceived need for uniformity. Pp. 3–7.

236 U. S. App. D. C. 248, 734 F. 2d 1531, affirmed.

REHNQUIST, J., delivered the opinion of the Court, in which BURGER, C. J., and WHITE, POWELL, and STEVENS, JJ., joined. STEVENS, J., filed a concurring opinion, in which WHITE and POWELL, JJ., joined. BRENNAN, J., filed a dissenting opinion, in which MARSHALL, J., joined.

Syllabus

BLACKMUN, J., filed a dissenting opinion. O'CONNOR, J., filed a dissenting opinion, in which MARSHALL, J., joined.

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D. C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

No. 84-1097

S. SIMCHA GOLDMAN, PETITIONER *v.* CASPAR W. WEINBERGER, SECRETARY OF DEFENSE, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

[March 25, 1986]

JUSTICE REHNQUIST delivered the opinion of the Court.

Petitioner S. Simcha Goldman contends that the Free Exercise Clause of the First Amendment to the United States Constitution permits him to wear a yarmulke while in uniform, notwithstanding an Air Force regulation mandating uniform dress for Air Force personnel. The District Court for the District of Columbia permanently enjoined the Air Force from enforcing its regulation against petitioner and from penalizing him for wearing his yarmulke. The Court of Appeals for the District of Columbia Circuit reversed on the ground that the Air Force's strong interest in discipline justified the strict enforcement of its uniform dress requirements. We granted certiorari because of the importance of the question, and now affirm.

Petitioner Goldman is an Orthodox Jew and ordained rabbi. In 1973, he was accepted into the Armed Forces Health Professions Scholarship Program and placed on inactive reserve status in the Air Force while he studied clinical psychology at Loyola University of Chicago. During his three years in the scholarship program, he received a monthly stipend and an allowance for tuition, books, and fees. After completing his Ph.D. in psychology, petitioner entered active service in the United States Air Force as a commissioned officer, in accordance with a requirement that participants in the scholarship program serve one year of active duty for each year of subsidized education. Petitioner was stationed at March Air Force Base in Riverside, California, and served as a clinical psychologist at the mental health clinic on the base.

Until 1981, petitioner was not prevented from wearing his yarmulke on the base. He avoided controversy by remaining close to his duty station in the health clinic and by wearing his service cap over the yarmulke when out of doors. But in April 1981, after he testified as a defense witness at a court-martial wearing his yarmulke but not his service cap, opposing counsel lodged a complaint with Colonel Joseph Gregory, the Hospital Commander, arguing that petitioner's practice of wearing his yarmulke was a violation of Air Force Regulation (AFR) 35–10. This regulation states in pertinent part that "[h]eadgear will not be worn . . . [w]hile indoors except by armed security police in the performance of their duties." AFR 35–10, ¶1–6.h(2)(f) (1980).

Colonel Gregory informed petitioner that wearing a yarmulke while on duty does indeed violate AFR 35–10, and ordered him not to violate this regulation outside the hospital. Although virtually all of petitioner's time on the base was spent in the hospital, he refused. Later, after petitioner's attorney protested to the Air Force General Counsel, Colonel Gregory revised his order to prohibit petitioner from wearing the yarmulke even in the hospital. Petitioner's request to report for duty in civilian clothing pending legal resolution of the issue was denied. The next day he received a formal letter of reprimand, and was warned that failure to obey AFR 35–10 could subject him to a court-martial. Colonel Gregory also withdrew a recommendation that petitioner's application to extend the term of his active service be approved, and substituted a negative recommendation.

Petitioner then sued respondent Secretary of Defense and others, claiming that the application of AFR 35–10 to prevent him from wearing his Yarmulke infringed upon his First Amendment freedom to exercise his religious beliefs. The

United States District Court for the District of Columbia preliminarily enjoined the enforcement of the regulation, 530 F. Supp. 12 (1981), and then after a full hearing permanently enjoined the Air Force from prohibiting petitioner from wearing a yarmulke while in uniform. Respondents appealed to the Court of Appeals for the District of Columbia Circuit, which reversed. 236 U. S. App. D. C. 248, 734 F. 2d 1531 (1984). As an initial matter, the Court of Appeals determined that the appropriate level of scrutiny of a military regulation that clashes with a constitutional right is neither strict scrutiny nor rational basis. *Id.*, at 252, 734 F. 2d, at 1535–1536. Instead, it held that a military regulation must be examined to determine whether "legitimate military ends are sought to be achieved," *id.*, at 253, 734 F. 2d, at 1536, and whether it is "designed to accommodate the individual right to an appropriate degree." *Ibid.* Applying this test, the court concluded that "the Air Force's interest in uniformity renders the strict enforcement of its regulation permissible." *Id.*, at 257, 734 F. 2d, at 1540. The full Court of Appeals denied a petition for rehearing en banc, with three judges dissenting. 238 U. S. App. D. C. 267, 739 F. 2d 657 (1984).

Petitioner argues that AFR 35–10, as applied to him, prohibits religiously motivated conduct and should therefore be analyzed under the standard enunciated in *Sherbert* v. *Verner*, 374 U. S. 398, 406 (1963). See also *Thomas* v. *Review Board*, 450 U. S. 707 (1981); *Wisconsin* v. *Yoder*, 406 U. S. 205 (1972). But we have repeatedly held that "the military is, by necessity, a specialized society separate from civilian society." *Parker* v. *Levy*, 417 U. S. 733, 743 (1974). See also *Chappell* v. *Wallace*, 462 U. S. 296, 300 (1983); *Schlesinger* v. *Councilman*, 420 U. S. 738, 757 (1975); *Orloff* v. *Willoughby*, 345 U. S. 83, 94 (1953). "[T]he military must insist upon a respect for duty and a discipline without counterpart in civilian life," *Schlesinger* v. *Councilman*, *supra*, at 757, in order to prepare for and perform its vital role. See also *Brown* v. *Glines*, 444 U. S. 348, 354 (1980).

Our review of military regulations challenged on First Amendment grounds is far more deferential than constitutional review of similar laws or regulations designed for civilian society. The military need not encourage debate or tolerate protest to the extent that such tolerance is required of the civilian state by the First Amendment; to accomplish its mission the military must foster instinctive obedience, unity, commitment, and esprit de corps. See, *e. g.*, *Chappell* v. *Wallace*, *supra*, at 300; *Greer* v. *Spock*, 424 U. S. 828, 843–844 (1976) (POWELL, J., concurring); *Parker* v. *Levy*, *supra*, at 744. The essence of military service "is the subordination of the desires and interests of the individual to the needs of the service." *Orloff* v. *Willoughby*, *supra*, at 92.

These aspects of military life do not, of course, render entirely nugatory in the military context the guarantees of the First Amendment. See, *e. g.*, *Chappell* v. *Wallace*, *supra*, at 304. But "within the military community there is simply not the same [individual] autonomy as there is in the larger civilian community." *Parker* v. *Levy*, *supra*, at 751. In the context of the present case, when evaluating whether military needs justify a particular restriction on religiously motivated conduct, courts must give great deference to the professional judgment of military authorities concerning the relative importance of a particular military interest. See *Chappell* v. *Wallace*, *supra*, at 305; *Orloff* v. *Willoughby*, *supra*, 93–94. Not only are courts "'ill-equipped to determine the impact upon discipline that any particular intrusion upon military authority might have,'" *Chappell* v. *Wallace*, *supra*, at 305, quoting Warren, The Bill of Rights and the Military, 37 N. Y. U. L. Rev. 181, 187 (1962), but the military authorities have been charged by the Executive and Legislative Branches with carrying out our Nation's military policy. "Judicial deference . . . is at its apogee when legislative action under the congressional authority to raise and support armies and make rules and regulations for their governance is challenged." *Rostker* v. *Goldberg*, 453 U. S. 57, 70 (1981).

The considered professional judgment of the Air Force is that the traditional outfitting of personnel in standardized uniforms encourages the subordination of personal preferences and identities in favor of the overall group mission. Uniforms encourage a sense of hierarchical unity by tending to eliminate outward individual distinctions except for those of rank. The Air Force considers them as vital during peacetime as during war because its personnel must be ready to provide an effective defense on a moment's notice; the necessary habits of discipline and unity must be developed in advance of trouble. We have acknowledged that "[t]he inescapable demands of military discipline and obedience to orders cannot be taught on battlefields; the habit of immediate compliance with military procedures and orders must be virtually reflex with no time for debate or reflection." *Chappell* v. *Wallace*, *supra*, at 300.

To this end, the Air Force promulgated AFR 35–10, a 190-page document, which states that "Air Force members will wear the Air Force uniform while performing their military duties, except when authorized to wear civilian clothes on duty." AFR § 35–10, ¶ 1–6 (1980). The rest of the document describes in minute detail all of the various items of apparel that must be worn as part of the Air Force uniform. It authorizes a few individualized options with respect to certain pieces of jewelry and hair style, but even these are subject to severe limitations. See AFR 35–10, Table 1–1, and ¶ 1–12.b(1)(b) (1980). In general, authorized headgear may be worn only out of doors. See AFR § 35–10, ¶ 1–6.h (1980). Indoors, "[h]eadgear [may] not be worn . . . except by armed security police in the performance of their duties." AFR 35–10, ¶ 1–6.h(2)(f) (1980). A narrow exception to this rule exists for headgear worn during indoor religious ceremonies. See AFR 35–10, ¶ 1–6.h(2)(d) (1980). In addition, military commanders may in their discretion permit visible religious headgear and other such apparel in designated living quarters and nonvisible items generally. See Department of Defense Directive 1300.17 (June 18, 1985).

Petitioner Goldman contends that the Free Exercise Clause of the First Amendment requires the Air Force to make an exception to its uniform dress requirements for religious apparel unless the accoutrements create a "clear danger" of undermining discipline and esprit de corps. He asserts that in general, visible but "unobtrusive" apparel will not create such a danger and must therefore be accommodated. He argues that the Air Force failed to prove that a specific exception for his practice of wearing an unobtrusive yarmulke would threaten discipline. He contends that the Air Force's assertion to the contrary is mere *ipse dixit*, with no support from actual experience or a scientific study in the record, and is contradicted by expert testimony that religious exceptions to AFR 35–10 are in fact desirable and will increase morale by making the Air Force a more humane place.

But whether or not expert witnesses may feel that religious exceptions to AFR 35–10 are desirable is quite beside the point. The desirability of dress regulations in the military is decided by the appropriate military officials, and they are under no constitutional mandate to abandon their considered professional judgment. Quite obviously, to the extent the regulations do not permit the wearing of religious apparel such as a yarmulke, a practice described by petitioner as silent devotion akin to prayer, military life may be more objectionable for petitioner and probably others. But the First Amendment does not require the military to accommodate such practices in the face of its view that they would detract from the uniformity sought by the dress regulations. The Air Force has drawn the line essentially between religious apparel which is visible and that which is not, and we hold that those portions of the regulations challenged here reasonably and evenhandedly regulate dress in the interest of the military's perceived need for uniformity. The First Amendment therefore does not prohibit them from being applied to petitioner even though their effect is to restrict the wearing of the headgear required by his religious beliefs.

The judgment of the Court of Appeals is

Affirmed.

SUPREME COURT OF THE UNITED STATES

No. 84-1097

S. SIMCHA GOLDMAN, PETITIONER *v.* CASPAR W. WEINBERGER, SECRETARY OF DEFENSE, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

[March 25, 1986]

JUSTICE STEVENS, with whom JUSTICE WHITE and JUSTICE POWELL join, concurring.

Captain Goldman presents an especially attractive case for an exception from the uniform regulations that are applicable to all other Air Force personnel. His devotion to his faith is readily apparent. The yarmulke is a familiar and accepted sight.[1] In addition to its religious significance for the wearer, the yarmulke may evoke the deepest respect and admiration—the symbol of a distinguished tradition[2] and an eloquent rebuke to the ugliness of anti-Semitism.[3] Captain Goldman's military duties are performed in a setting in which a modest departure from the uniform regulation creates almost no danger of impairment of the Air Force's military mission. Moreover, on the record before us, there is reason to believe that the policy of strict enforcement against Captain Goldman had a retaliatory motive—he had worn his yarmulke while testifying on behalf of a defendant in a court-martial proceeding.[4] Nevertheless, as the case has been argued,[5] I believe we must test the validity of the Air Force's rule not

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[1] Captain Goldman states in his brief:

"Yarmulkes are generally understood to be a form of religious observance. They are commonly seen and accepted in today's society wherever Orthodox Jews are found. University campuses—particularly on the East Coast—have substantial numbers of young men who wear yarmulkes. On the streets of New York City, Los Angeles, Chicago, or Miami, yarmulkes are commonplace. They are increasingly visible in centers of commerce, including retail businesses, brokerage houses, and stock exchanges. Attorneys wearing yarmulkes can be found in the state and federal courthouses of New York, and attorneys wearing yarmulkes have been permitted to sit in the Bar Section of this Court and attend oral arguments." Brief for Petitioner 11.

[2] In dissenting from the Court of Appeals' denial of rehearing en banc, Judge Starr was moved to describe the yarmulke as the "symbol of [a] faith whose roots are as deep and venerable as Western civilization itself" and the "symbol of a great faith from which Western morality and the Judaeo-Christian tradition have arisen." 238 U. S. App. D. C. 267, 268, 739 F. 2d 657, 658 (1984).

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[3] Cf. N. Belth, A Promise to Keep (1979) (recounting history of anti-Semitism in the United States). The history of intolerance in our own country can be glimpsed by reviewing Justice Story's observation that the purpose of the First Amendment was "not to countenance, much less to advance Mahometanism, or Judaism, or infidelity, by prostrating Christianity; but to exclude all rivalry among Christian sects," 2 J. Story, Commentaries on the Constitution of the United States § 1877, p. 594 (1851)—a view that the Court has, of course, explicitly rejected. See *Wallace* v. *Jaffree*, 472 U. S. —, — (1985).

[4] Before the testimony at the court martial that provoked this confrontation, Captain Goldman had received extremely high ratings in his performance evaluations. App. 214–225. Indeed, one of the evaluators noted, "He maintains appropriate military dress and bearing." *Id.*, at 217. Although the Air Force stated that an officer had received one or two complaints about Captain Goldman's wearing of the yarmulke, *id.*, at 15, 22, no complaint was acted upon until the court martial incident. See 29 EPD ¶ 32,753 (1982) (District Court finding that, until the court martial, "no objection was raised to Goldman's wearing his yarmulke while in uniform").

[5] Captain Goldman has mounted a broad challenge to the prohibition on visible religious wear as it applies to yarmulkes. He has not argued the far narrower ground that, even if the general prohibition is valid, its application in his case was retaliatory and impermissible. See, *e. g.*, Brief for Petitioner i (stating the Question Presented as "Whether the Air Force may constitutionally prohibit an Orthodox Jewish psychologist from wearing a 'yarmulke'—an unobtrusive skullcap which is part of his religious observance—while he is in uniform on duty at a military hospital"); *id.*, at 8 ("The Air Force's asserted grounds for barring yarmulkes are patently unsound. . . . Indeed the symbolic significance of our Nation's military services and the educational role of the military in teaching the young

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merely as it applies to Captain Goldman but also as it applies to all service personnel who have sincere religious beliefs that may conflict with one or more military commands.

JUSTICE BRENNAN is unmoved by the Government's concern "that while a yarmulke might not seem obtrusive to a Jew, neither does a turban to a Sikh, a saffron robe to a Satchidananda Ashram-Integral Yogi, nor do dreadlocks to a Rastafarian." *Post*, at 6. He correctly points out that "turbans, saffron robes, and dreadlocks are not before us in this case," and then suggests that other cases may be fairly decided by reference to a reasonable standard based on "functional utility, health and safety considerations, and the goal of a polished, professional appearance." *Id.*, at 7. As the Court has explained, this approach attaches no weight to the separate interest in uniformity itself. Because professionals in the military service attach great importance to that plausible interest, it is one that we must recognize as legitimate and rational even though personal experience or admiration for the performance of the "rag-tag band of soldiers" that won us our freedom in the revolutionary war might persuade us that the Government has exaggerated the importance of that interest.

The interest in uniformity, however, has a dimension that is of still greater importance for me. It is the interest in uniform treatment for the members of all religious faiths. The very strength of Captain Goldman's claim creates the danger that a similar claim on behalf of a Sikh or a Rastafarian might readily be dismissed as "so extreme, so unusual, or so faddish an image that public confidence in his ability to perform his duties will be destroyed." *Post*, at 5–6. If exceptions from dress code regulations are to be granted on the basis of a multifactored test such as that proposed by JUSTICE BRENNAN, inevitably the decisionmaker's evaluation of the charac-

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defenders of our country the principles of liberty require acceptance of petitioner's religious observance").

ter and the sincerity of the requestor's faith—as well as the probable reaction of the majority to the favored treatment of a member of that faith—will play a critical part in the decision. For the difference between a turban or a dreadlock on the one hand, and a yarmulke on the other, is not merely a difference in "appearance"—it is also the difference between a Sikh or a Rastafarian, on the one hand, and an Orthodox Jew on the other. The Air Force has no business drawing distinctions between such persons when it is enforcing commands of universal application.[*]

As the Court demonstrates, the rule that is challenged in this case is based on a neutral, completely objective standard—visibility. It was not motivated by hostility against, or any special respect for, any religious faith. An exception for yarmulkes would represent a fundamental departure from the true principle of uniformity that supports that rule. For that reason, I join the Court's opinion and its judgment.

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[*] See *United States* v. *Lee*, 455 U. S. 252, 263, n. 2 (1982) (STEVENS, J., concurring in the judgment) ("In my opinion, the principal reason for adopting a strong presumption against such claims is not a matter of administrative convenience. It is the overriding interest in keeping the government—whether it be the legislature or the courts—out of the business of evaluating the relative merits of differing religious claims"). Cf. *Wallace* v. *Jaffree*, 472 U. S., at —— (referring to "the established principle that the Government must pursue a course of complete neutrality toward religion"); *Committee for Public Education* v. *Nyquist*, 413 U. S. 756, 792–793 (1973) ("A proper respect for both the Free Exercise and the Establishment Clauses compels the State to pursue a course of 'neutrality' toward religion"); *Abington School District* v. *Schempp*, 374 U. S. 203, 226 (1963) ("In the relationship between man and religion, the State is firmly committed to a position of neutrality").

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SUPREME COURT OF THE UNITED STATES

No. 84-1097

S. SIMCHA GOLDMAN, PETITIONER *v.* CASPAR W. WEINBERGER, SECRETARY OF DEFENSE ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

[March 25, 1986]

JUSTICE BRENNAN, with whom JUSTICE MARSHALL joins, dissenting.

Simcha Goldman invokes this Court's protection of his First Amendment right to fulfill one of the traditional religious obligations of a male Orthodox Jew—to cover his head before an omnipresent God. The Court's response to Goldman's request is to abdicate its role as principal expositor of the Constitution and protector of individual liberties in favor of credulous deference to unsupported assertions of military necessity. I dissent.

I

In ruling that the paramount interests of the Air Force override Dr. Goldman's free exercise claim, the Court overlooks the sincere and serious nature of his constitutional claim. It suggests that the desirability of certain dress regulations, rather than a First Amendment right, is at issue. The Court declares that in selecting dress regulations, "military officials are under no constitutional mandate to abandon their considered professional judgment." *Ante*, at 6. If Dr. Goldman wanted to wear a hat to keep his head warm or to cover a bald spot I would join the majority. Mere personal preferences in dress are not constitutionally protected. The First Amendment, however, restrains the

Government's ability to prevent an Orthodox Jewish serviceman from, or punish him for, wearing a yarmulke.[1]

The Court also attempts, unsuccessfully, to minimize the burden that was placed on Dr. Goldman's rights. The fact that "the regulations don't permit the wearing of . . . a yarmulke," does not simply render military life for observant Orthodox Jews "objectionable." *Ibid.* It sets up an almost absolute bar to the fulfillment of a religious duty. Dr. Goldman spent most of his time in uniform indoors, where the dress code forbade him even from covering his head with his service cap. Consequently, he was asked to violate the tenets of his faith virtually every minute of every work day.

II

A

Dr. Goldman has asserted a substantial First Amendment claim, which is entitled to meaningful review by this Court. The Court, however, evades its responsibility by eliminating, in all but name only, judicial review of military regulations that interfere with the fundamental constitutional rights of service personnel.

Our cases have acknowledged that in order to protect our treasured liberties, the military must be able to command service members to sacrifice a great many of the individual freedoms they enjoyed in the civilian community and to endure certain limitations on the freedoms they retain. See, *e. g.*, *Brown* v. *Glines*, 444 U. S. 348, 354–357 (1980); *Greer* v. *Spock*, 424 U. S. 828, 848 (1976) (POWELL, J., concurring); *Parker* v. *Levy*, 417 U. S. 733, 743–744, 751 (1974). Notwithstanding this acknowledgment, we have steadfastly maintained that " 'our citizens in uniform may not be stripped of basic rights simply because they have doffed their civilian clothes.' " *Chappell* v. *Wallace*, 462 U. S. 296, 304 (1983) (quoting Warren, The Bill of Rights and the Military, 37

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[1] The yarmulke worn by Dr. Goldman was a dark-colored skullcap measuring approximately 5½ inches in diameter. Brief for Petitioner 3.

N. Y. U. L. Rev. 181, 188 (1962)); see also, *Glines*, *supra*, at 354. And, while we have hesitated, due to our lack of expertise concerning military affairs and our respect for the delegated authority of a coordinate branch, to strike down restrictions on individual liberties which could reasonably be justified as necessary to the military's vital function, see, *e. g.*, *Rostker* v. *Goldberg*, 453 U. S. 57, 66–67 (1981) (citing cases), we have never abdicated our obligation of judicial review. See, *e. g.*, *id.*, at 67.

Today the Court eschews its constitutionally mandated role. It adopts for review of military decisions affecting First Amendment rights a subrational-basis standard—absolute, uncritical "deference to the professional judgment of military authorities." *Ante*, at 4. If a branch of the military declares one of its rules sufficiently important to outweigh a service person's constitutional rights, it seems that the Court will accept that conclusion, no matter how absurd or unsupported it may be.

A deferential standard of review, however, need not, and should not, mean that the Court must credit arguments that defy common sense. When a military service burdens the free exercise rights of its members in the name of necessity, it must provide, as an initial matter and at a minimum, a *credible* explanation of how the contested practice is likely to interfere with the proffered military interest.[2] Unabashed *ipse dixit* cannot outweigh a constitutional right.

In the present case, the Air Force asserts that its interests in discipline and uniformity would be undermined by an exception to the dress code permitting observant male Orthodox Jews to wear yarmulkes. The Court simply restates these assertions without offering any explanation how the exception Dr. Goldman requests reasonably could interfere with the Air Force's interests. Had the Court given actual consideration to Goldman's claim, it would have been compelled to decide in his favor.

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[2] I continue to believe that Government restraints on First Amendment rights, including limitations placed on military personnel, may be justified only upon showing a compelling state interest which is precisely furthered by a narrowly tailored regulation. See, *e. g.*, *Brown* v. *Glines*, 444 U. S. 348, 367 (1980) (BRENNAN, J., dissenting). I think that any special needs of the military can be accommodated in the compelling interest prong of the test. My point here is simply that even under a more deferential test Dr. Goldman should prevail.

B

1

The Government maintains in its brief that discipline is jeopardized whenever exceptions to military regulations are granted. Service personnel must be trained to obey even the most arbitrary command reflexively. Non-Jewish personnel will perceive the wearing of a yarmulke by an Orthodox Jew as an unauthorized departure from the rules and will begin to question the principle of unswerving obedience. Thus shall our fighting forces slip down the treacherous slope toward unkempt appearance, anarchy, and, ultimately, defeat at the hands of our enemies.

The contention that the discipline of the armed forces will be subverted if Orthodox Jews are allowed to wear yarmulkes with their uniforms surpasses belief. It lacks support in the record of this case and the Air Force offers no basis for it as a general proposition. While the perilous slope permits the services arbitrarily to refuse exceptions requested to satisfy mere personal preferences, before the Air Force may burden free exercise rights it must advance, at the *very least*, a rational reason for doing so.

Furthermore, the Air Force cannot logically defend the content of its rule by insisting that discipline depends upon absolute adherence to whatever rule is established. If, as General Usher admitted at trial, App. 52, the dress code codified religious exemptions from the "no-headgear-indoors" regulation, then the wearing of a yarmulke would be sanctioned by the code and could not be considered an unauthorized deviation from the rules.

2

The Government also argues that the services have an important interest in uniform dress, because such dress establishes the preeminence of group identity, thus fostering esprit de corps and loyalty to the service that transcends individual bonds. In its brief, the Government characterizes the yarmulke as an assertion of individuality and as a badge of religious and ethnic identity, strongly suggesting that, as such, it could drive a wedge of divisiveness between members of the services.

First, the purported interests of the Air Force in complete uniformity of dress and in elimination of individuality or visible identification with any group other than itself are belied by the service's own regulations. The dress code expressly abjures the need for total uniformity:

> "(1) The American public and its elected representatives draw certain conclusions on military effectiveness based on what they see; that is, the image the Air Force presents. The image must instill public confidence and leave no doubt that the service member lives by a common standard and responds to military order and discipline.
>
> "(2) Appearance in uniform is an important part of this image. . . . Neither the Air Force nor the public expects absolute uniformity of appearance. Each member has the right, within limits, to express individuality through his or her appearance. However, the image of a disciplined service member who can be relied on to do his or her job excludes the extreme, the unusual, and the fad." AFR 35-10, ¶1-12a.(1) & (2) (1978).[3]

It cannot be seriously contended that a serviceman in a yarmulke presents so extreme, so unusual, or so faddish an image that public confidence in his ability to perform his duties will be destroyed. Under the Air Force's own standards, then, Dr. Goldman should have and could have been granted an exception to wear his yarmulke.

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[3] The 1978 and 1980 editions of AFR 35-10 governed, sequentially, the Air Force dress code during Dr. Goldman's period of service. The two editions are substantially identical in all respects relevant to this case.

The dress code also allows men to wear up to three rings and one identification bracelet of "neat and conservative," but non-uniform, design. AFR 35-10, ¶1-12b.(1)(b) (1978). This jewelry is apparently permitted even if, as is often the case with rings, it associates the wearer with a denominational school or a religious or secular fraternal organization. If these emblems of religious, social, and ethnic identity are not deemed to be unacceptably divisive, the Air Force cannot rationally justify its bar against yarmulkes on that basis.

Moreover, the services allow, and rightly so, other manifestations of religious diversity. It is clear to all service personnel that some members attend Jewish services, some Christian, some Islamic, and some yet other religious services. Barracks mates see Mormons wearing temple garments, Orthodox Jews wearing tzitzit, and Catholics wearing crosses and scapulars. That they come from different faiths and ethnic backgrounds is not a secret that can or should be kept from them.

I find totally implausible the suggestion that the overarching group identity of the Air Force would be threatened if Orthodox Jews were allowed to wear yarmulkes with their uniforms. To the contrary, a yarmulke worn with a United States military uniform is an eloquent reminder that the shared and proud identity of United States serviceman embraces and unites religious and ethnic pluralism.

Finally, the Air Force argues that while Dr. Goldman describes his yarmulke as an "unobtrusive" addition to his uniform, obtrusiveness is a purely relative, standardless judgment. The Government notes that while a yarmulke might not seem obtrusive to a Jew, neither does a turban to a Sikh, a saffron robe to a Satchidananda Ashram-Integral Yogi, nor do dreadlocks to a Rastafarian. If the Court were to require the Air Force to permit yarmulkes, the service must also allow all of these other forms of dress and grooming.

The Government dangles before the Court a classic parade of horribles, the specter of a brightly-colored, "rag-tag band of soldiers." Brief for Respondents 20. Although turbans, saffron robes, and dreadlocks are not before us in this case and must each be evaluated against the reasons a service branch offers for prohibiting personnel from wearing them while in uniform, a reviewing court could legitimately give deference to dress and grooming rules that have a *reasoned* basis in, for example, functional utility, health and safety considerations, and the goal of a polished, professional appearance.[4] AFR 35–10, ¶1–12a and 1–12a(1) (1978) (identifying neatness, cleanliness, safety, and military image as the four elements of the dress code's "high standard of dress and personal appearance"). It is the lack of any reasoned basis for prohibiting yarmulkes that is so striking here.

Furthermore, contrary to its intimations, the Air Force has available to it a familiar standard for determining whether a particular style of yarmulke is consistent with a polished, professional military appearance—the "neat and conservative" standard by which the service judges jewelry. AFR 35–10, ¶1–12b.(1)(b) (1978). No rational reason exists why yarmulkes cannot be judged by the same criterion. Indeed, at argument Dr. Goldman declared himself willing to wear whatever style and color yarmulke the Air Force believes best comports with its uniform. Tr. 18.

3

Department of Defense Directive 1300.17 (June 18, 1985) grants commanding officers the discretion to permit service personnel to wear religious items and apparel that are not visible with the uniform, such as crosses, temple garments, and scapulars. JUSTICE STEVENS favors this "visibility test" because he believes that it does not involve the Air Force in drawing distinctions among faiths. *Ante*, at 3–4. He rejects functional utility, health, and safety considerations, and similar grounds as criteria for religious exceptions to the dress code, because he fears that these standards will allow some service persons to satisfy their religious dress and grooming obligations, while preventing others from fulfilling theirs. *Ibid.* But, the visible/not visible standard has that same effect. Furthermore, it restricts the free exercise rights of a larger number of service persons. The visibility test permits *only* individuals whose outer garments and grooming are indistinguishable from those of mainstream Christians to fulfill their religious duties. In my view, the Constitution requires the selection of criteria that permit the greatest possible number of persons to practice their faiths freely.

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[4] For example, the Air Force could no doubt justify regulations ordering troops to wear uniforms, prohibiting garments that could become entangled in machinery, and requiring hair to be worn short so that it may not be grabbed in combat and may be kept louse-free in field conditions.

Implicit in JUSTICE STEVENS' concurrence, and in the Government's arguments, is what might be characterized as a fairness concern. It would be unfair to allow Orthodox Jews to wear yarmulkes, while prohibiting members of other minority faiths with visible dress and grooming requirements from wearing their saffron robes, dreadlocks, turbans, and so forth. While I appreciate and share this concern for the feelings and the free exercise rights of members of these other faiths, I am baffled by this formulation of the problem. What puzzles me is the implication that a neutral standard that could result in the disparate treatment of Orthodox Jews and, for example, Sikhs is *more* troublesome or unfair than the existing neutral standard that does result in the different treatment of Christians, on the one hand, and Orthodox Jews and Sikhs on the other. *Both* standards are constitutionally suspect; before either can be sustained, it must be shown to be a narrowly tailored means of promoting important military interests.

I am also perplexed by the related notion that for purposes of constitutional analysis religious faiths may be divided into two categories—those with visible dress and grooming requirements and those without. This dual category approach seems to incorporate an assumption that fairness, the First Amendment, and, perhaps, Equal Protection, require all faiths belonging to the same category to be treated alike, but permit a faith in one category to be treated differently from a faith belonging to the other category. The practical effect of this categorization is that, under the guise of neutrality and evenhandedness, majority religions are favored over distinctive minority faiths. This dual category analysis is fundamentally flawed and leads to a result that the First Amendment was intended to prevent. Under the Constitution there is only *one* relevant category—*all* faiths. Burdens placed on the free exercise rights of members of one faith must be justified independently of burdens placed on the rights of members of another religion. It is not enough to say that Jews cannot wear yarmulkes simply because Rastafarians might not be able to wear dreadlocks.

Unless the visible/not visible standard for evaluating requests for religious exceptions to the dress code promotes a significant military interest, it is constitutionally impermissible. JUSTICE STEVENS believes that this standard advances an interest in the "uniform treatment" of all religions. *Ante*, at 3. As I have shown, that uniformity is illusory, unless uniformity means uniformly accommodating majority religious practices and uniformly rejecting distinctive minority practices. But, more directly, Government agencies are not free to define their own interests in uniform treatment of different faiths. That function has been assigned to the First Amendment. The First Amendment requires that burdens on free exercise rights be justified by independent and important interests that promote the function of the agency. See, *e. g., United States* v. *Lee*, 455 U. S. 252, 257–258 (1982); *Thomas* v. *Review Bd. of Indiana Employment Security Di-*

vision, 450 U. S. 707 (1981); *Wisconsin* v. *Yoder*, 406 U. S. 205 (1972); *Sherbert* v. *Verner*, 374 U. S. 398 (1963). The only independent military interest furthered by the visibility standard is uniformity of dress. And, that interest, as I demonstrated in Part II B §2, *supra*, does not support a prohibition against yarmulkes.

The Air Force has failed utterly to furnish a credible explanation why an exception to the dress code permitting Orthodox Jews to wear neat and conservative yarmulkes while in uniform is likely to interfere with its interest in discipline and uniformity. We cannot "distort the Constitution to approve all that the military may deem expedient." *Korematsu* v. *United States*, 323 U. S. 214, 244 (1944) (Jackson, J., dissenting). Under any meaningful level of judicial review, Simcha Goldman should prevail.

III

Through our Bill of Rights, we pledged ourselves to attain a level of human freedom and dignity that had no parallel in history. Our constitutional commitment to religious freedom and acceptance of religious pluralism is one of our greatest achievements in that noble endeavor. Almost 200 years after the First Amendment was drafted, tolerance and respect for all religions still set us apart from most other countries and draws to our shores refugees from religious persecution from around the world.

Guardianship of this precious liberty is not the exclusive domain of federal courts. It is the responsibility as well of the States and of the other branches of the Federal Government. Our military services have a distinguished record of providing for many of the religious needs of their personnel. But that they have satisfied much of their constitutional obligation does not remove their actions from judicial scrutiny. Our Nation has preserved freedom of religion, not through trusting to the good faith of individual agencies of government alone, but through the constitutionally mandated vigilant oversight and checking authority of the judiciary.

It is not the province of the federal courts to second-guess the professional judgments of the military services, but we are bound by the Constitution to assure ourselves that there exists a rational foundation for assertions of military necessity when they interfere with the free exercise of religion. "The concept of military necessity is seductively broad," *Glines*, 444 U. S., at 369 (BRENNAN, J., dissenting), and military decisionmakers themselves are as likely to succumb to its allure as are the courts and the general public. Definitions of necessity are influenced by decisionmakers' experiences and values. As a consequence, in pluralistic societies such as ours, institutions dominated by a majority are inevitably, if inadvertently, insensitive to the needs and values of minorities when these needs and values differ from those of the majority. The military, with its strong ethic of conformity and unquestioning obedience, may be particularly impervious to minority needs and values. A critical function of the Religion Clauses of the First Amendment is to protect the rights of members of minority religions against quiet erosion by majoritarian social institutions that dismiss minority beliefs and practices as unimportant, because unfamiliar. It is the constitutional role of this Court to ensure that this purpose of the First Amendment be realized.

The Court and the military services[5] have presented patriotic Orthodox Jews with a painful dilemma—the choice between fulfilling a religious obligation and serving their country. Should the draft be reinstated, compulsion will replace choice. Although the pain the services inflict on Orthodox Jewish servicemen is clearly the result of insensitivity rather than design, it is unworthy of our military because it is unnecessary. The Court and the military have refused these servicemen their constitutional rights; we must hope that Congress will correct this wrong.

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[5] I refer to all of the military services rather than just to the Air Force because, as the Government emphasizes in its brief, Brief for Respondents 20, n. 11, all of the uniformed services have dress and appearance regulations comparable to AFR 35–10, and the Court's decision in this case will apply to all the services. Furthermore, all Military Departments are subject to the recent Department of Defense Directive 1300.17 (June 18, 1985) which deals with the accomodation of religious practices. This directive does not provide for the type of exeption sought by Dr. Goldman.

SUPREME COURT OF THE UNITED STATES

No. 84-1097

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

[March 25, 1986]

JUSTICE BLACKMUN, dissenting.

I would reverse the judgment of the Court of Appeals, but for reasons somewhat different from those respectively enunciated by JUSTICE BRENNAN and JUSTICE O'CONNOR. I feel that the Air Force is justified in considering not only the costs of allowing Captain Goldman to cover his head indoors, but also the cumulative costs of accommodating constitutionally indistinguishable requests for religious exemptions. Because, however, the Government has failed to make any meaningful showing that either set of costs is significant, I dissent from the Court's rejection of Goldman's claim.

The Government concedes that Goldman wears his yarmulke out of sincere religious conviction. For Goldman, as for many other Jews, "a yarmulke is an expression of respect for God . . . intended to keep the wearer aware of God's presence." App. 156 (petitioner's deposition). If the Free Exercise Clause of the First Amendment means anything, it must mean that an individual's desire to follow his or her faith is not simply another personal preference, to be accommodated by government when convenience allows. Indeed, this Court has read the Clause, I believe correctly, to require that "only those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion." *Wisconsin* v. *Yoder*, 406 U. S. 205, 215 (1972). In general, government "may justify an inroad on religious liberty only by showing that it is the least restrictive means of achieving some compelling state interest." *Thomas* v. *Review Board of Indiana Employment Security Div.*, 450 U. S. 707 (1981); see also *Sherbert* v. *Verner*, 374 U. S. 398 (1963). The clear import of *Sherbert*, *Yoder*, and *Thomas* is that this showing must be made even when the inroad results from the "evenhanded" application of a facially neutral requirement. "Rules are rules" is not by itself a sufficient justification for infringing religious liberty.

Nor may free exercise rights be compromised simply because the military says they must be. To be sure, application of the First Amendment to members of the armed services must take into account "the different character of the military community and of the military mission." *Parker* v. *Levy*, 417 U. S. 733, 758 (1974). As JUSTICE BRENNAN and JUSTICE O'CONNOR point out, however, military personnel do not forfeit their constitutional rights as a price of enlistment. Except as otherwise required by "interests of the highest order," soldiers as well as civilians are entitled to follow the dictates of their faiths.

In my view, this case does not require us to determine the extent to which the ordinary test for inroads on religious freedom must be modified in the military context, because the Air Force has failed to produced even a minimally credible explanation for its refusal to allow Goldman to keep his head covered indoors. I agree with the Court that deference is due the considered judgment of military professionals that, as a general matter, standardized dress serves to promote discipline and esprit de corps. But Goldman's modest supplement to the Air Force uniform clearly poses by itself no threat to the Nation's military readiness. Indeed, the District Court specifically found that Goldman has worn a yarmulke on base for years without any adverse effect on his performance, any disruption of operations at the base, or any complaints from other personnel. App. to Pet. for Cert. 32a.

The Air Force argues that it has no way of distinguishing fairly between Goldman's request for an exemption and the potential requests of others whose religious practices may conflict with the appearance code, perhaps in more conspicuous ways. In theory, this argument makes some sense. Like any rules prescribing a uniform, the Air Force dress code is by nature arbitrary; few of its requirements could be defended on purely functional grounds. Particularly for personnel such as Goldman who serve in noncombat roles, variations from the prescribed attire frequently will interfere with no military goals other than those served by uniformity itself. There thus may be no basis on which to distinguish some variations from others, aside from the degree to which they detract from the overall image of the service, a criterion that raises special constitutional problems when applied to religious practices. To allow noncombat personnel to wear yarmulkes but not turbans or dreadlocks because the latter seem more obtrusive—or, as JUSTICE BRENNAN suggests, less "polished" and "professional," *ante*, at 7—would be to discriminate in favor of this country's more established, mainstream religions, the practices of which are more familiar to the average observer. Not only would conventional faiths receive special treatment under such an approach; they would receive special treatment precisely *because* they are conventional. In general, I see no constitutional difficulty in distinguishing between religious practices based on how difficult it would be to accommodate them, but favoritism based on how unobtrusive a practice appears to the majority could create serious problems of equal protection and religious establishment, problems the Air Force clearly has a strong interest in avoiding by drawing an objective line at visibility.

The problem with this argument, it seems to me, is not doctrinal but empirical. The Air Force simply has not shown any reason to fear that a significant number of enlisted personnel and officers would request religious exemptions that could not be denied on neutral grounds such as safety, let alone that granting these requests would noticeably impair the overall image of the service. Cf. *Thomas* v. *Review Board of Indiana Employment Security Div.*, 450 U. S., at 719; *Sherbert* v. *Verner*, 374 U. S., at 407. The Air Force contends that the potential for such disruption was demonstrated at trial through the introduction of an Army publication discussing the beliefs and practices of a variety of religious denominations, some of which have traditions or requirements involving attire. See Department of the Army Pamphlet No. 165–13–1, Religious Requirements and Practices of Certain Selected Groups: A Handbook Supplement for Chaplains (1980). But that publication provides no indication whatsoever as to how many soldiers belong to the denominations it describes, or as to how many are likely to seek religious exemptions from the dress code.

In these circumstances, deference seems unwarranted. Reasoned military judgments, of course, are entitled to respect, but the military has failed to show that this particular judgment with respect to Captain Goldman is a reasoned one. If, in the future, the Air Force is besieged with requests for religious exemptions from the dress code, and those requests cannot be distinguished on functional grounds from Goldman's, the service may be able to argue credibly that circumstances warrant a flat rule against any visible religious apparel. That, however, would be a case different from the one at hand.

SUPREME COURT OF THE UNITED STATES

No. 84-1097

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

[March 25, 1986]

JUSTICE O'CONNOR, with whom JUSTICE MARSHALL joins, dissenting.

The issue posed in this case is whether, consistent with the Free Exercise Clause of the First Amendment, the Air Force may prohibit Captain Goldman, an Orthodox Jewish psychologist, from wearing a yarmulke while he is in uniform on duty inside a military hospital.

The Court rejects Captain Goldman's claim without even the slightest attempt to weigh his asserted right to the free exercise of his religion against the interest of the Air Force in uniformity of dress within the military hospital. No test for Free Exercise claims in the military context is even articulated, much less applied. It is entirely sufficient for the Court if the military perceives a need for uniformity.

JUSTICE STEVENS acknowledges that "Captain Goldman's military duties are performed in a setting in which a modest departure from the uniform regulation creates almost no danger of impairment of the Air Force's military mission." *Ante*, at 2 (concurring). Nevertheless, JUSTICE STEVENS is persuaded that a governmental regulation based on *any* "neutral, completely objective standard," *id.*, at 4, will survive a free exercise challenge.

In contrast, JUSTICE BRENNAN recognizes that the Court "overlooks the sincere and serious nature of [the] constitutional claim." *Ante*, at 1 (dissenting). He properly notes that, even with respect to military rules and regulations, the courts have a duty to weigh sincere First Amendment claims of its members against the necessity of the particular application of the rule. But JUSTICE BRENNAN applies no particular test or standard to determine such claims.

JUSTICE BLACKMUN focuses on the particular ways in which the military may pursue its interest in uniformity, *ante*, at 3–4 (dissenting), but nonetheless declines "to determine the extent to which the ordinary test for inroads on religious freedom must be modified in the military context," *id.*, at 2.

I believe that the Court should attempt to articulate and apply an appropriate standard for a free exercise claim in the military context, and should examine Captain Goldman's claim in light of that standard.

Like the Court today in this case involving the military, the Court in the past has had some difficulty, even in the civilian context, in articulating a clear standard for evaluating free exercise claims that result from the application of general state laws burdening religious conduct. In *Sherbert* v. *Verner*, 374 U. S. 398 (1963), and *Thomas* v. *Review Board*, 450 U. S. 707 (1981), the Court required the States to demonstrate that their challenged policies were "the least restrictive means of achieving some compelling state interest" in order to deprive claimants of unemployment benefits when the refusal to work was based on sincere religious beliefs. *Thomas*, *supra*, at 718. See also *Sherbert*, *supra*, at 406–408. In *Wisconsin* v. *Yoder*, 406 U. S. 205, 215 (1972), the Court noted that "only those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion" in deciding that the Amish were exempt from a State's requirement that children attend school through the age of 16. In *United States* v. *Lee*, 455 U. S. 252, 257–258 (1982), the Court stated that "[t]he State may justify a limitation on religious liberty by showing that it is essential to accomplish an overriding governmental interest," and held that the Amish could not exempt themselves from the Social Security system on religious grounds. See also *Gillette* v. *United States*, 401 U. S. 437 (1971) (rejecting claims under the Establishment and Free Exercise Clauses to the Federal Government's refusal to give conscientious-objector status to those objecting on religious grounds only to a particular war rather than to all wars).

These tests, though similar, are not identical. One can, however, glean at least two consistent themes from this Court's precedents. First, when the government attempts to deny a Free Exercise claim, it must show that an unusually important interest is at stake, whether that interest is denominated "compelling," "of the highest order," or "overriding." Second, the government must show that granting the requested exemption will do substantial harm to that interest, whether by showing that the means adopted is the "least restrictive" or "essential," or that the interest will not "otherwise be served." These two requirements are entirely sensible in the context of the assertion of a free exercise claim. First, because the government is attempting to override an interest specifically protected by the Bill of Rights, the government must show that the opposing interest it asserts is of especial importance before there is any chance that its claim can prevail. Second, since the Bill of Rights is expressly designed to protect the individual against the aggregated and sometimes intolerant powers of the state, the government must show that the interest asserted will in fact be substantially harmed by granting the type of exemption requested by the individual.

There is no reason why these general principles should not apply in the military, as well as the civilian, context. As this Court has stated unanimously, "'our citizens in uniform may not be stripped of basic rights simply because they have doffed their civilian clothes.'" *Chappell* v. *Wallace*, 462 U. S. 296, 304 (1983) (quoting Warren, The Bill of Rights and the Military, 37 N. Y. U. L. Rev. 181, 188 (1962)). Furthermore, the test that one can glean from this Court's decisions in the civilian context is sufficiently flexible to take into account the special importance of defending our Nation without abandoning completely the freedoms that make it worth defending.

The first question that the Court should face here, therefore, is whether the interest that the Government asserts against the religiously based claim of the individual is of unusual importance. It is perfectly appropriate at this step of the analysis to take account of the special role of the military. The mission of our armed services is to protect our Nation from those who would destroy all our freedoms. I agree that, in order to fulfill that mission, the military is entitled to take some freedoms from its members. As the Court notes, the military "'must insist upon a respect for duty and a discipline without counterpart in civilian life.'" *Ante*, at 3 (quoting *Schlesinger* v. *Councilman*, 420 U. S. 738, 757 (1975)). The need for military discipline and esprit de corps is unquestionably an especially important governmental interest.

But the mere presence of such an interest cannot, as the majority implicitly believes, end the analysis of whether a refusal by the Government to honor the free exercise of an individual's religion is constitutionally acceptable. A citizen pursuing even the most noble cause must remain within the bounds of the law. So, too, the Government may, even in pursuing its most compelling interests, be subject to specific restraints in doing so. The second question in the analysis of a Free Exercise claim under this Court's precedents must also be reached here: will granting an exemption of the type requested by the individual do substantial harm to the especially important governmental interest?

I have no doubt that there are many instances in which the unique fragility of military discipline and esprit de corps necessitates rigidity by the Government when similar rigidity to preserve an assertedly analogous interest would not pass constitutional muster in the civilian sphere. Compare *Greer* v. *Spock*, 424 U. S. 828 (1976) with *Metromedia, Inc.* v. *San Diego*, 453 U. S. 490 (1981) and *West Virginia Board of Education* v. *Barnette*, 319 U. S. 624, 630–634 (1943). Nonetheless, as JUSTICE BRENNAN persuasively argues, the Government can present no sufficiently convincing proof in *this* case to support an assertion that granting an exemption of the type requested here would do substantial harm to military discipline and esprit de corps. *Ante*, at 5–8 (BRENNAN, J., dissenting).

First, the Government's asserted need for absolute uniformity is contradicted by the Government's own exceptions to its rule. As JUSTICE BRENNAN notes, *ante*, at 5–6, an Air Force dress code in force at the time of Captain Goldman's service states:

> "Neither the Air Force nor the public expects absolute uniformity of appearance. Each member has the right, within limits, to express individuality through his or her appearance. However, the image of a disciplined service member who can be relied on to do his or her job excludes the extreme, the unusual, and the fad." AFR 35–10, ¶1–12.a.(2) (1978).

Furthermore, the Government does not assert, and could not plausibly argue, that petitioner's decision to wear his yarmulke while indoors at the hospital presents a threat to health or safety. And finally, the District Court found as fact that in this particular case, far from creating discontent or indiscipline in the hospital where Captain Goldman worked, "[f]rom September 1977 to May 7, 1981, *no objection* was raised to Goldman's wearing of his yarmulke while in uniform." See 29 EPD ¶32,753 (1982); Finding of Fact No. 4 (emphasis added).

In the rare instances where the military has not consistently or plausibly justified its asserted need for rigidity of enforcement, and where the individual seeking the exemption establishes that the assertion by the military of a threat to discipline or esprit de corps is in his or her case completely unfounded, I would hold that the Government's policy of uniformity must yield to the individual's assertion of the right of free exercise of religion. On the facts of this case, therefore, I would require the Government to accommodate the sincere religious belief of Captain Goldman. Napoleon may have been correct to assert that, in the military sphere, morale is to all other factors as three is to one,* but contradicted assertions of necessity by the military do not on the scales of justice bear a similarly disproportionate weight to sincere religious beliefs of the individual.

I respectfully dissent.

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*See Letter, Aug. 27, 1808 ("In war, moral considerations account for three-quarters, the balance of actual forces only for the other quarter"), as translated and quoted in J. Cohen & M. Cohen, The Penguin Dictionary of Quotations 268 (1962).

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(Slip Opinion)

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Lumber Co.*, 200 U. S. 321, 337.

ORIGINAL

SUPREME COURT OF THE UNITED STATES

Syllabus

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PEMBAUR *v.* CITY OF CINCINNATI ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 84-1160. Argued December 2, 1985—Decided March 25, 1986

Petitioner, a physician and the proprietor of a clinic in Cincinnati, Ohio, that provided medical services primarily to welfare recipients, was indicted by a grand jury for fraudulently accepting payments from state welfare agencies. During the grand jury investigation, subpoenas were issued for the appearance of two of petitioner's employees. When the employees failed to appear, the Assistant County Prosecutor obtained capiases for their detention. But when two county Deputy Sheriffs attempted to serve the capiases at petitioner's clinic, he barred the door and refused to let them enter the part of the clinic where the employees presumably were located. Thereafter, Cincinnati police officers, whom petitioner had called, appeared and told petitioner to allow the Deputy Sheriffs to enter. Petitioner continued to refuse. The Deputy Sheriffs then called their superior who told them to call the County Prosecutor's Office and to follow his instructions. The Deputy Sheriffs spoke to the Assistant Prosecutor assigned to the case. He in turn conferred with the County Prosecutor, who told him to instruct the Deputy Sheriffs to "go in and get" the employees. The Assistant Prosecutor relayed these instructions to the Deputy Sheriffs. After the Deputy Sheriffs tried unsuccessfully to force the door, city police officers obtained an axe and chopped down the door. The Deputy Sheriffs then entered and searched the clinic but were unable to locate the employees sought. Although petitioner was acquitted of the fraud charges, he was indicted and convicted for obstructing police in the performance of an authorized act. His conviction was upheld by the Ohio Supreme Court. Petitioner then filed a damages action in Federal District Court under 42 U. S. C. § 1983 against the county, among other defendants, alleging that the county had violated his rights under the Fourth and Fourteenth Amendments. The District Court dismissed the claim against the county on the ground that the individual officers were not acting pursuant to the kind of "official policy" that is the predicate for municipal liability under *Monell* v. *New York City Dept. of Social Services*, 436 U. S. 658. The Court of Appeals affirmed, holding that petitioner had failed to prove the existence of a county policy because he had shown nothing more than that on "this one occasion" the Prosecutor and the Sheriff decided to force entry into petitioner's clinic.

Held: The judgment is reversed, and the case is remanded.

746 F. 2d 337, reversed and remanded.

JUSTICE BRENNAN delivered the opinion of the Court with respect to Parts I, II–A, and II–C, concluding that:

1. The "official policy" requirement of *Monell* was intended to distinguish acts of the *municipality* from acts of the municipality's *employees*, and thereby make clear that municipal liability is limited to actions for which the municipality is actually responsible. *Monell* held that recovery from a municipality is limited to acts that are, properly speaking, "of the municipality," *i. e.*, acts that the municipality has officially sanctioned or ordered. With this understanding, it is plain that municipal liability may be imposed for a single decision by municipal policymakers under appropriate circumstances. If the decision to adopt a particular course of action is directed by those who establish governmental policy, the municipality is equally responsible whether that action is to be taken only once or to be taken repeatedly. Pp. 7–11.

2. It was error to dismiss petitioner's claim against the county. Ohio law authorizes the County Sheriff to obtain instructions from the County Prosecutor. The Sheriff followed the practice of delegating certain decisions to the Prosecutor where appropriate. In this case, the Deputy Sheriffs received instructions from the Sheriff's Office to follow the orders of the County Prosecutor, who made a considered decision based on his understanding of the law and commanded the Deputy Sheriffs to enter petitioner's clinic. That decision directly caused a violation of petitioner's Fourth Amendment rights. In ordering the Deputy Sheriffs to enter petitioner's clinic to serve the capiases on the employees, the County Prosecutor was acting as the final decisionmaker for the county, and the county may therefore be held liable under § 1983. Pp. 13–15.

JUSTICE BRENNAN, joined by JUSTICE WHITE, JUSTICE MARSHALL, and JUSTICE BLACKMUN, concluded in Part II–B that not every decision by municipal officers automatically subjects the municipality to § 1983 liability. The fact that a particular official has discretion in the exercise of particular functions does not give rise to municipal liability based on an exercise of that discretion unless the official is also responsible, under state law, for establishing final governmental policy respecting such

Syllabus

activity. Municipal liability under § 1983 attaches where—and only where—a deliberate choice to follow a course of action is made from among various alternatives by the official or officials responsible for establishing final policy with respect to the subject matter in question. Pp. 11–13.

Brennan, J., delivered the opinion of the Court with respect to Parts I, II–A, and II–C, in which **White**, **Marshall**, **Blackmun**, **Stevens**, and **O'Connor** (except for Part II–C), JJ., joined, and an opinion with respect to Part II–B, in which **White**, **Marshall**, and **Blackmun**, JJ., joined. **White**, J., filed a concurring opinion. **Stevens** and **O'Connor**, JJ., filed opinions concurring in part and concurring in the judgment. **Powell**, J., filed a dissenting opinion, in which **Burger**, C. J., and **Rehnquist**, J., joined.

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D. C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

No. 84-1160

BERTOLD J. PEMBAUR, PETITIONER *v.* CITY OF CINCINNATI ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

[March 25, 1986]

JUSTICE BRENNAN delivered the opinion of the Court, except as to Part II-B.

In *Monell* v. *New York City Dept. of Social Services*, 436 U. S. 658 (1978), the Court concluded that municipal liability under 42 U. S. C. § 1983 is limited to deprivations of federally protected rights caused by action taken "pursuant to official municipal policy of some nature . . . ." *Id.*, at 691. The question presented is whether, and in what circumstances, a decision by municipal policymakers on a single occasion may satisfy this requirement.

I

Bertold Pembaur is a licensed Ohio physician and the sole proprietor of the Rockdale Medical Center, located in the city of Cincinnati in Hamilton County. Most of Pembaur's patients are welfare recipients who rely on government assistance to pay for medical care. During the spring of 1977, Simon Leis, the Hamilton County Prosecutor, began investigating charges that Pembaur fraudulently had accepted payments from state welfare agencies for services not actually provided to patients. A grand jury was convened, and the case was assigned to Assistant Prosecutor William Whalen. In April, the grand jury charged Pembaur in a six-count indictment.

During the investigation, the grand jury issued subpoenas for the appearance of two of Pembaur's employees. When these employees failed to appear as directed, the prosecutor obtained capiases for their arrest and detention from the Court of Common Pleas of Hamilton County.[1]

On May 19, 1977, two Hamilton County Deputy Sheriffs attempted to serve the capiases at Pembaur's clinic. Although the reception area is open to the public, the rest of the clinic may be entered only through a door next to the receptionist's window. Upon arriving, the Deputy Sheriffs identified themselves to the receptionist and sought to pass through this door, which was apparently open. The receptionist blocked their way and asked them to wait for the doctor. When Pembaur appeared a moment later, he and the receptionist closed the door, which automatically locked from the inside, and wedged a piece of wood between it and the wall. Returning to the receptionist's window, the Deputy Sheriffs identified themselves to Pembaur, showed him the capiases and explained why they were there. Pembaur refused to let them enter, claiming that the police had no legal authority to be there and requesting that they leave. He told them that he had called the Cincinnati police, the local media, and his lawyer. The Deputy Sheriffs decided not to take further action until the Cincinnati police arrived.

Shortly thereafter, several Cincinnati police officers appeared. The Deputy Sheriffs explained the situation to them and asked that they to speak to Pembaur. The Cincinnati police told Pembaur that the papers were lawful and that he should allow the Deputy Sheriffs to enter. When Pembaur refused, the Cincinnati police called for a superior officer. When he too failed to persuade Pembaur to open the door, the Deputy Sheriffs decided to call their supervisor for further instructions. Their supervisor told them to call Assistant Prosecutor Whalen and to follow his instructions. The Deputy Sheriffs then telephoned Whalen and informed him of the situation. Whalen conferred with County Prosecutor Leis, who told Whalen to instruct the Deputy Sheriffs to "go in and get [the witnesses]." Whalen in turn passed these instructions along to the Deputy Sheriffs.

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[1] A capias is a writ of attachment commanding a county official to bring a subpoenaed witness who has failed to appear before the court to testify and to answer for civil contempt. See Ohio Rev. Code Ann. § 2317.21 (1981).

After a final attempt to persuade Pembaur voluntarily to allow them to enter, the Deputy Sheriffs tried unsuccessfully to force the door. City police officers, who had been advised of the County Prosecutor's instructions to "go in and get" the witnesses, obtained an axe and chopped down the door. The Deputy Sheriffs then entered and searched the clinic. Two individuals who fit descriptions of the witnesses sought were detained, but turned out not to be the right persons.

After this incident, the prosecutor obtained an additional indictment against Pembaur for obstructing police in the performance of an authorized act. Although acquitted of all other charges, Pembaur was convicted for this offense. The Ohio Court of Appeals reversed, reasoning that Pembaur was privileged under state law to exclude the deputies because the search of his office violated the Fourth Amendment. *State* v. *Pembaur*, No. C–790380 (Hamilton County Court of Appeals Nov. 3, 1982). The Ohio Supreme Court reversed and reinstated the conviction. *State* v. *Pembaur*, 9 Ohio St.3d 136, 459 N. E. 2d 217 (1984), cert. denied, 467 U. S. 1219 (1984). The supreme court held that the state law privilege applied only to bad-faith conduct by law enforcement officials, and that, under the circumstances of this case, Pembaur was obliged to acquiesce to the search and seek redress later, in a civil action for damages. 9 Ohio St. 3d, at 138, 459 N. E. 2d, at 219.

On April 20, 1981, Pembaur filed the present action in the United States District Court for the Southern District of Ohio against the city of Cincinnati, the county of Hamilton, the Cincinnati Police Chief, the Hamilton County Sheriff, the members of the Hamilton Board of County Commissioners (in their official capacities only), Assistant Prosecutor Whalen, and nine city and county police officers.[2] Pembaur sought damages under 42 U. S. C. § 1983, alleging that the county and city police had violated his rights under the Fourth and Fourteenth Amendments. His theory was that, absent exigent circumstances, the Fourth Amendment prohibits police from searching an individual's home or business without a search warrant even to execute an arrest warrant for a third person. We agreed with that proposition in *Steagald* v. *United States*, 451 U. S. 204 (1981), decided the day after Pembaur filed this lawsuit. Pembaur sought $10 million in actual and $10 million in punitive damages, plus costs and attorney's fees.

Much of the testimony at the 4-day trial concerned the practices of the Hamilton County police in serving capiases. Frank Webb, one of the Deputy Sheriffs present at the clinic on May 19, testified that he had previously served capiases on the property of third persons without a search warrant, but had never been required to use force to gain access. Assistant Prosecutor Whalen was also unaware of a prior instance in which police had been denied access to a third person's property in serving a capias and had used force to gain entry. Lincoln Stokes, the County Sheriff, testified that the Department had no written policy respecting the serving of capiases on the property of third persons and that the proper response in any given situation would depend upon the circumstances. He too could not recall a specific instance in which entrance had been denied and forcibly gained. Sheriff Stokes did testify, however, that it was the practice in his Department to refer questions to the County Prosecutor for instructions under appropriate circumstances and that "it was the proper thing to do" in this case.

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[2] Hamilton County Prosecutor Leis was not made a defendant because counsel for petitioner believed that Leis was absolutely immune. Tr. Mar. 14–Mar. 17., p. 267. We express no view as to the correctness of this evaluation. Cf. *Imbler* v. *Pachtman*, 424 U. S. 409, 430–31 (1976) (leaving open the question of a prosecutor's immunity when he acts "in the role of an administrator or investigative officer rather than that of an advocate").

The District Court awarded judgment to the defendants and dismissed the complaint in its entirety. The court agreed that the entry and search of Pembaur's clinic violated the Fourth Amendment under *Steagald*, *supra*, but held *Steagald* inapplicable since it was decided nearly four years after the incident occurred. Because it construed the law in the Sixth Circuit in 1977 to permit law enforcement officials to enter the premises of a third person to serve a capias, the District Court held that the individual municipal officials were all immune under *Harlow* v. *Fitzgerald*, 457 U. S. 800 (1982).

The claims against the county and the city were dismissed on the ground that the individual officers were not acting pursuant to the kind of "official policy" that is the predicate for municipal liability under *Monell*. With respect to Hamilton County, the court explained that, even assuming that the entry and search were pursuant to a governmental policy, "it was not a policy of Hamilton County *per se*" because "[t]he Hamilton County Board of County Commissioners, acting on behalf of the county, simply does not establish or control the policies of the Hamilton County Sheriff." With respect to the city of Cincinnati, the court found that "the only policy or custom followed . . . was that of aiding County Sheriff's Deputies in the performance of their duties." The court found that any participation by city police in the entry and search of the clinic resulted from decisions by individual officers as to the permissible scope of assistance they could provide, and not from a city policy to provide this particular kind of assistance.

On appeal, Pembaur challenged only the dismissal of his claims against Whalen, Hamilton County, and the city of Cincinnati. The Court of Appeals for the Sixth Circuit upheld the dismissal of Pembaur's claims against Whalen and Hamilton County, but reversed the dismissal of his claim against the city of Cincinnati on the ground that the District Court's findings concerning the policies followed by the Cincinnati police were clearly erroneous. 746 F. 2d 337 (1984).[3]

The Court of Appeals affirmed the District Court's dismissal of Pembaur's claim against Hamilton County, but on different grounds. The court held that the County Board's lack of control over the Sheriff would not preclude county liability if "the nature and duties of the Sheriff are such that his acts may fairly be said to represent the county's official policy with respect to the specific subject matter." *Id.*, at 340–341. Based upon its examination of Ohio law, the Court of Appeals found it "clea[r]" that the Sheriff and the Prosecutor were both county officials authorized to establish "the official policy of Hamilton County" with respect to matters of law enforcement. *Id.*, at 341. Notwithstanding these conclusions, however, the court found that Pembaur's claim against the county had been properly dismissed:

> "We believe that Pembaur failed to prove the existence of a county policy in this case. Pembaur claims that the deputy sheriffs acted pursuant to the policies of the Sheriff and Prosecutor by forcing entry into the medical center. Pembaur has failed to establish, however, anything more than that, on this *one occasion*, the Prosecutor and the Sheriff decided to force entry into his office. . . . That single, discrete decision is insufficient, by itself, to establish that the Prosecutor, the Sheriff, or both were implementing a governmental policy." *Ibid.* (footnote omitted) (emphasis in original).

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[3] The court found that there was a city policy respecting the use of force in serving capiases as well as a policy of aiding county police. It based this conclusion on the testimony of Cincinnati Chief of Police Myron Leistler, who stated that it was the policy of his Department to take whatever steps were necessary, including the forcing of doors, to serve an arrest document. 746 F. 2d, at 341–342; see also, Tr. Mar. 14–Mar. 17, pp. 43–45, 46–47. The court remanded the case for a determination whether Pembaur's injury was incurred as a result of the execution of this policy. 746 F. 2d, at 342.

Pembaur petitioned for certiorari to review only the dismissal of his claim against Hamilton County. The decision of the Court of Appeals conflicts with holdings in several other Courts of Appeals,[4] and we granted the petition to resolve the conflict. 472 U. S. —— (1985). We reverse.

II

A

Our analysis must begin with the proposition that "Congress did not intend municipalities to be held liable unless action pursuant to official municipal policy of some nature caused a constitutional tort." *Monell* v. *New York City Dept. of Social Services*, 436 U. S., at 691.[5] As we read its opinion, the Court of Appeals held that a single decision to take particular action, although made by municipal policymakers, cannot establish the kind of "official policy" required by *Monell* as a predicate to municipal liability under § 1983.[4] The Court of Appeals reached this conclusion without referring to *Monell*—indeed, without any explanation at all. However, examination of the opinion in *Monell* clearly demonstrates that the Court of Appeals misinterpreted its holding.

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[4] See, *e. g.*, *McKinley* v. *City of Eloy*, 705 F. 2d 1110, 1116–1117 (CA9 1983); *Berdin* v. *Duggan*, 701 F. 2d 909, 913–914 (CA11), cert. denied, 464 U. S. 893 (1983); *Van Ooteghem* v. *Gray*, 628 F. 2d 488, 494–495 (CA5 1980), cert. denied, 455 U. S. 909 (1982); *Quinn* v. *Syracuse Model Neighborhood Corp.*, 613 F. 2d 438, 448 (CA2 1980). See also, *Sanders* v. *St. Louis County*, 724 F. 2d 665, 668 (CA8 1983) (*per curiam*) ("It may be that one act of a senior county official is enough to establish the liability of the county, if that official was in a position to establish policy and if that official himself directly violated another's constitutional rights"). But see *Losch* v. *Borough of Parkesburg, Pa.*, 736 F. 2d 903, 910–911 (CA3 1984) ("even if [the police chief] were the final authority with regard to police activities, . . . there is no regulation or evidence of any repeated action by [the chief] . . . that can transmute his actions in the Losch incident into a general Borough policy").

[5] There is no question in this case that petitioner suffered a constitutional deprivation. The Court of Appeals found, and respondent concedes, that the entry and search of petitioner's clinic violated the Fourth Amendment under *Steagald*, *supra*. See 746 F. 2d, at 340 n. 1; Brief for Respondent 11. Respondent never challenged and has in fact also conceded that *Steagald* applies retroactively to this case. See Tr. of Oral Arg. 26–27. We decide this case in light of respondent's concessions.

Monell is a case about responsibility. In the first part of the opinion, we held that local government units could be made liable under § 1983 for deprivations of federal rights, overruling a contrary holding in *Monroe* v. *Pape*, 365 U. S. 157 (1961). In the second part of the opinion, we recognized a limitation on this liability and concluded that a municipality cannot be made liable by application of the doctrine of *respondeat superior*. See *Monell*, *supra*, at 691. In part, this conclusion rested upon the language of § 1983, which imposes liability only on a person who "subjects, or causes to be subjected" any individual to a deprivation of federal rights; we noted that this language "cannot easily be read to impose liability vicariously on government bodies solely on the basis of the existence of an employer-employee relationship with a tortfeasor." *Id.*, at 692. Primarily, however, our conclusion rested upon the legislative history, which disclosed that, while Congress never questioned its power to impose civil liability on municipalities for their *own* illegal acts, Congress did doubt its constitutional power to impose such liability in order to oblige municipalities to control the conduct of *others*. *Id.*, at 665–683.[7] We found that, because of these doubts, Congress chose not to create such obligations in § 1983. Recognizing that this would be the effect of a federal law of *respondeat superior*, we concluded that § 1983 could not be interpreted to incorporate doctrines of vicarious liability. *Id.*, at 692–694, and n. 57.

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[4] The opinion below also can be read as holding that municipal liability cannot be imposed for a single incident of unconstitutional *conduct* by municipal employees whether or not that conduct is pursuant to municipal *policy*. Such a conclusion is unsupported by either the language or reasoning of *Monell*, or by any of our subsequent decisions. As we explained last Term in *Oklahoma City* v. *Tuttle*, 471 U. S. —— (1985), once a municipal policy is established, "it requires only one application . . . to satisfy fully *Monell*'s requirement that a municipal corporation be held liable only for constitutional violations resulting from the municipality's official policy." *Id.*, at —— (plurality opinion); see also, *id.*, at —— (BRENNAN, J., concurring). The only issue before us, then, is whether petitioner satisfied *Monell*'s requirement that the tortious conduct be pursuant to "official municipal policy."

The conclusion that tortious conduct, to be the basis for municipal liability under § 1983, must be pursuant to a municipality's "official policy" is contained in this discussion. The "official policy" requirement was intended to distinguish acts of the *municipality* from acts of *employees* of the municipality, and thereby make clear that municipal liability is limited to action for which the municipality is actually responsible.[8] *Monell* reasoned that recovery from a municipality is

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[7] This legislative history is discussed at length in *Monell* and need only be summarized here. The distinction between imposing liability on municipalities for their own violations and imposing liability to force municipalities to prevent violations by others was made by members of the House of Representatives who successfully opposed the "Sherman amendment" to the Civil Rights Act of 1871, 17 Stat. 13, the precursor of § 1983. The Sherman amendment sought to impose civil liability on municipalities for damage done to the person or property of its inhabitants by private persons "riotously and tumultuously assembled." Cong. Globe 42d Cong., 1st Sess., 749 (1871) (quoted in *Monell*, 436 U. S., at 664). Opponents of the amendment argued that, in effect, it imposed an obligation on local governments to keep the peace, and that the Federal Government could not constitutionally require local governments to keep the peace if state law did not. This argument succeeded in blocking passage of the amendment. However, even the opponents of the Sherman amendment recognized Congress' power to impose civil liability on a local government already obligated to keep the peace by state law if that government failed to do so and thereby violated the Fourteenth Amendment. See 436 U. S., at 665–683.

[8] Thus, our statement of the conclusion juxtaposes the policy requirement with imposing liability on the basis of *respondeat superior*:

"We conclude, therefore, that a local government may not be sued under § 1983 for an injury inflicted solely by its employees or agents. Instead, it is when execution of a government's policy . . . whether made by its law-limited to acts that are, properly speaking, acts "of the municipality"—that is, acts which the municipality has officially sanctioned or ordered.

With this understanding, it is plain that municipal liability may be imposed for a single decision by municipal policymakers under appropriate circumstances. No one has ever doubted, for instance, that a municipality may be liable under § 1983 for a single decision by its properly constituted legislative body—whether or not that body had taken similar action in the past or intended to do so in the future—because even a single decision by such a body unquestionably constitutes an act of official government policy. See, *e. g.*, *Owen* v. *City of Independence*, 445 U. S. 622 (1980) (city council passed resolution firing plaintiff without a pretermination hearing); *Newport* v. *Fact Concerts, Inc.*, 453 U. S. 247 (1981) (city council cancelled license permitting concert because of dispute over content of performance). But the power to establish policy is no more the exclusive province of the legislature at the local level than at the state or national level. *Monell's* language makes clear that it expressly envisioned other officials "whose acts or edicts may fairly be said to represent official policy," *Monell*, *supra*, at 694, and whose decisions therefore may give rise to municipal liability under § 1983.

Indeed, any other conclusion would be inconsistent with the principles underlying § 1983. To be sure, "official policy" often refers to formal rules or understandings—often but not always committed to writing—that are intended to, and do, establish fixed plans of action to be followed under similar circumstances consistently and over time. That was the case in *Monell* itself, which involved a written rule requiring pregnant employees to take unpaid leaves of absence before such leaves were medically necessary. However, as in *Owen* and *Newport*, a government frequently chooses a course of action

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makers or by those whose acts or edicts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible under § 1983." 436 U. S., at 694.

tailored to a particular situation and not intended to control decisions in later situations. If the decision to adopt that particular course of action is properly made by that government's authorized decisionmakers, it surely represents an act of official government "policy" as that term is commonly understood.[9] More importantly, where action is directed by those who establish governmental policy, the municipality is equally responsible whether that action is to be taken only once or to be taken repeatedly. To deny compensation to the victim would therefore be contrary to the fundamental purpose of § 1983.

B

Having said this much, we hasten to emphasize that not every decision by municipal officers automatically subjects the municipality to § 1983 liability. Municipal liability attaches only where the decisionmaker possesses final authority to establish municipal policy with respect to the action ordered.[10] The fact that a particular official—even a policymaking official—has discretion in the exercise of particular functions does not, without more, give rise to municipal liability based on an exercise of that discretion. See *e. g.*, *Oklahoma City* v. *Tuttle*, 471 U. S., at ——.[11] The official must also be responsible for establishing final government policy respecting such activity before the municipality can be held liable.[12] Authority to make municipal policy may be

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[9] While the dictionary is not the source definitively to resolve legal questions, we note that this description of "policy" is consistent with the word's ordinary definition. For example, Webster's defines the word as "a specific decision or set of decisions designed to carry out such a chosen course of action." Webster's Third New International Dictionary 1754 (1981). Similarly, the Oxford English Dictionary defines "policy" as "[a] course of action adopted and pursued by a government, party, ruler, statesman, etc.; any course of action adopted as advantageous or expedient." VII Oxford English Dictionary 1071 (1933). See also, Webster's New Twentieth Century Dictionary 1392 (2d ed. 1979) ("any governing principle, plan, or course of action"); Random House Dictionary 1113 (1966) ("a course of action adopted and pursued by a government, ruler, political party, etc.").

[10] Section 1983 also refers to deprivations under color of a state "custom or usage," and the Court in *Monell* noted accordingly that "local governments, like every other § 1983 'person,' . . . may be sued for constitutional deprivations visited pursuant to governmental 'custom' even though such a custom has not received formal approval through the body's official decisionmaking channels." 436 U. S., at 690–691. A § 1983 plaintiff thus may be able to recover from a municipality without adducing evidence of an affirmative decision by policymakers if able to prove that the challenged ac-

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tion was pursuant to a state "custom or usage." Because there is no allegation that the action challenged here was pursuant to a local "custom," this aspect of *Monell* is not at issue in this case.

[11] Respondent argues that the holding in *Tuttle* is far broader than this. It relies on the statement near the end of JUSTICE REHNQUIST's plurality opinion that "[p]roof of a single incident of unconstitutional activity is not sufficient to impose liability under *Monell* unless proof of the incident includes proof that it was caused by an *existing*, unconstitutional municipal policy, which policy can be attributed to a municipal policymaker." *Id.*, at —— (emphasis added). Respondent contends that a policy cannot be said to be "existing" unless similar action has been taken in the past.

This reading of the *Tuttle* plurality is strained, and places far too much weight on a single word. The plaintiff in *Tuttle* alleged that a police officer's use of excessive force deprived her decedent of life without due process of law. The plaintiff proved only a single instance of unconstitutional action by a nonpolicymaking employee of the city. She argued that the city had "caused" the constitutional deprivation by adopting a "policy" of inadequate training. The trial judge instructed the jury that a single, unusually excessive use of force may warrant an inference that it was attributable to grossly inadequate training, and that the municipality could be held liable on this basis. We reversed the judgment against the city. Although there was no opinion for the Court on this question, both the plurality and concurring opinions found plaintiff's submission inadequate because she failed to establish that the unconstitutional act was taken *pursuant to* a municipal policy rather than simply resulting from such a policy in a "but for" sense. 471 U. S., at —— (plurality opinion), —— (BRENNAN, J., concurring in the judgment). That conclusion is entirely consistent with our holding today that the policy which ordered or authorized an unconstitutional act can be established by a single decision by proper municipal policymakers.

[12] Thus, for example, the County Sheriff may have discretion to hire and fire employees without also being the county official responsible for establishing county employment policy. If this were the case, the Sheriff's decisions respecting employment would not give rise to municipal liability, al-

granted directly by a legislative enactment or may be delegated by an official who possesses such authority, and of course, whether an official had final policymaking authority is a question of state law. However, like other governmental entities, municipalities often spread policymaking authority among various officers and official bodies. As a result, particular officers may have authority to establish binding county policy respecting particular matters and to adjust that policy for the county in changing circumstances. To hold a municipality liable for actions ordered by such officers exercising their policymaking authority is no more an application of the theory of *respondeat superior* than was holding the municipalities liable for the decisions of the city councils in *Owen* and *Newport*. In each case municipal liability attached to a single decision to take unlawful action made by municipal policymakers. We hold that municipal liability under § 1983 attaches where—and only where—a deliberate choice to follow a course of action is made from among various alternatives by the official or officials responsible for establishing final policy with respect to the subject matter in question. See *Tuttle*, *supra*, at —— ("'policy' generally implies a course of action chosen from among various alternatives").

C

Applying this standard to the case before us, we have little difficulty concluding that the Court of Appeals erred in dismissing petitioner's claim against the county. The Deputy

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though similar decisions with respect to law enforcement practices, over which the Sheriff *is* the official policymaker, *would* give rise to municipal liability. Instead, if county employment policy was set by the Board of County Commissioners, only that body's decisions would provide a basis for county liability. This would be true even if the Board left the Sheriff discretion to hire and fire employees and the Sheriff exercised that discretion in an unconstitutional manner; the decision to act unlawfully would not be a decision of the Board. However, if the Board delegated its power to establish final employment policy to the Sheriff, the Sheriff's decisions *would* represent county policy and could give rise to municipal liability.

Sheriffs who attempted to serve the capiases at petitioner's clinic found themselves in a difficult situation. Unsure of the proper course of action to follow, they sought instructions from their supervisors. The instructions they received were to follow the orders of the County Prosecutor. The Prosecutor made a considered decision based on his understanding of the law and commanded the officers forcibly to enter petitioner's clinic. That decision directly caused the violation of petitioner's Fourth Amendment rights.

Respondent argues that the County Prosecutor lacked authority to establish municipal policy respecting law enforcement practices because only the County Sheriff may establish policy respecting such practices. Respondent suggests that the County Prosecutor was merely rendering "legal advice" when he ordered the Deputy Sheriffs to "go in and get" the witnesses. Consequently, the argument concludes, the action of the individual Deputy Sheriffs in following this advice and forcibly entering petitioner's clinic was not pursuant to a properly established municipal policy.

We might be inclined to agree with respondent if we thought that the Prosecutor had only rendered "legal advice." However, the Court of Appeals concluded, based upon its examination of Ohio law, that both the County Sheriff and the County Prosecutor could establish county policy under appropriate circumstances, a conclusion that we do not question here.[13] Ohio Rev. Code Ann. § 309.09 (1979) provides that county officers may "require . . . instructions from [the County Prosecutor] in matters connected with their official duties." Pursuant to standard office procedure, the Sheriff's office referred this matter to the Prosecutor and then followed his instructions. The Sheriff testified that his

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[13] We generally accord great deference to the interpretation and application of state law by the courts of appeals. *United States* v. *S. A. Empresa de Viacao Aerea Rio Grandense*, 467 U. S. 797, 815, n. 12 (1984); *Brockett* v. *Spokane Arcades, Inc.*, 472 U. S. ——, —— (1985) (citing cases); see also, *Bishop* v. *Wood*, 426 U. S. 341, 345–347 (1976).

Department followed this practice under appropriate circumstances and that it was "the proper thing to do" in this case. We decline to accept respondent's invitation to overlook this delegation of authority by disingenuously labeling the Prosecutor's clear command mere "legal advice." In ordering the Deputy Sheriffs to enter petitioner's clinic the County Prosecutor was acting as the final decisionmaker for the county, and the county may therefore be held liable under § 1983.

The decision of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

SUPREME COURT OF THE UNITED STATES

No. 84-1160

BERTOLD J. PEMBAUR, PETITIONER *v.* CITY OF CINCINNATI ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

[March 25, 1986]

JUSTICE WHITE, concurring.

The forcible entry made in this case was not then illegal under federal, state, or local law. The City of Cincinnati frankly conceded that forcible entry of third-party property to effect otherwise valid arrests was standard operating procedure. There is no reason to believe that the respondent would abjure using lawful means to execute the capiases issued in this case or had limited the authority of its officers to use force in executing capiases. Further, the county officials who had the authority to approve or disapprove such entries opted for the forceful entry, a choice that was later held to be inconsistent with the Fourth Amendment. Vesting discretion in its officers to use force and its use in this case sufficiently manifested county policy to warrant reversal of the judgment below.

This does not mean that every act of municipal officers with final authority to effect or authorize arrests and searches represents the policy of the municipality. It would be different if *Steagald* v. *United States*, 451 U. S. 204 (1981), had been decided when the events at issue here occurred, if the state constitution or statutes had forbade forceful entries without a warrant, or if there had been a municipal ordinance to this effect. Local law enforcement officers are expected to obey the law and ordinarily swear to do so when they take office. Where the controlling law places limits on their authority, they cannot be said to have the authority to make contrary policy. Had the sheriff or prosecutor in this case failed to follow an existing warrant requirement, it would be absurd to say that he was nevertheless executing county policy in authorizing the forceful entry in this case and even stranger to say that the county would be liable if the sheriff had secured a warrant and it turned out that he and the magistrate had mistakenly thought there was probable cause for the warrant. If deliberate or mistaken acts like this, admittedly contrary to local law, expose the county to liabiity, it must be on the basis of *respondeat superior* and not because the officers' acts represents local policy.

Such results would not conform to *Monell* and the cases following it. I do not understand the Court to hold otherwise in stating that municipal liability attaches where "a deliberate choice to follow a course of action is made from among various alternatives by the official or officials responsible for establishing final policy with respect to the subject matter in question." *Ante*, at ——. A sheriff, for example, is not the final policy maker with respect to the probable cause requirement for a valid arrest. He has no alternative but to act in accordance with the established standard; and his deliberate or mistaken departure from the controlling law of arrest would not represent municipal policy.

In this case, however, the sheriff and the prosecutor chose a course that was not forbidden by any applicable law, a choice that they then had the authority to make. This was county policy, and it was no less so at the time because a later decision of this Court declared unwarranted forceful entry into third party premises to be violation of the Fourth Amendment.* Hence, I join the Court's opinion and judgment.

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*The County has not challenged the retroactivity of *Steagald* v. *United States*, 451 U. S. 204 (1981), and I do not address that issue.

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SUPREME COURT OF THE UNITED STATES

No. 84-1160

BERTOLD J. PEMBAUR, PETITIONER *v.* CITY OF CINCINNATI ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

[March 25, 1986]

JUSTICE STEVENS, concurring in part and concurring in the judgment.

This is not a hard case. If there is any difficulty, it arises from the problem of obtaining a consensus on the meaning of the word "policy"—a word that does not appear in the text of 42 U. S. C. § 1983, the statutory provision that we are supposed to be construing. The difficulty is thus a consequence of this Court's lawmaking efforts rather than the work of the Congress of the United States.[1]

With respect to both the merits of the constitutional claim and the county's liability for the unconstitutional activities of its agents performed in the course of their official duties, there can be no doubt that the Congress that enacted the Klu Klux Act in 1871 intended the statute to authorize a recovery in a case of this kind. When police officers chopped down the door to petitioner's premises in order to serve capiases on two witnesses, they violated petitioner's constitutional rights. *Steagald* v. *United States*, 451 U. S. 204 (1981) makes it perfectly clear that forcible entry to a third party's premises to execute an arrest warrant is unconstitutional if the entry is without a search warrant and in the absence of consent or exigent circumstances.[2] In my view, it is not at all surprising that respondents have "conceded" the retroactivity of *Steagald*. For *Steagald* plainly presented its holding as compelled by, and presaged in, well-established precedent.[3]

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[1] See *Oklahoma City* v. *Tuttle*, 471 U. S. ——, —— (1985) (STEVENS, J., dissenting) ("While the Court purports to answer a question of statutory construction . . . its opinion actually provides us with an interpretation of the word 'policy' as it is used in Part II of the opinion in *Monell* v. *New York City Dept. of Social Services*, 436 U. S. 658, 690–695 (1978). The word 'policy' does not appear in the text of § 1983, but it provides the theme for today's decision"). It may be significant that the issue has apparently become, not the purpose and scope of 42 U. S. C. § 1983, but the nature of the liability "envisioned" by this Court "in *Monell*." *Post* (O'CONNOR, J., concurring in part and concurring in judgment); *post*, at 8 (POWELL, J., dissenting).

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[2] Indeed, it can be argued that the justification for a forcible entry to serve a capias, as in this case, is even weaker than the justification for a forcible entry to execute an arrest warrant, as in *Steagald*. Since the Sixth Circuit in this action, 746 F. 2d 337 (1984), and the Ohio Supreme Court in reviewing petitioner's conviction, *State* v. *Pembaur*, 9 Ohio St.3d 136, 459 N. E. 2d 217, cert. denied, 467 U. S. 1219 (1984), did not distinguish between the two situations, however, and since the forcible entry was unconstitutional under either conception, it is unnecessary to rest on that possible difference.

[3] See 451 U. S., at 211 ("Except in [cases of consent or exigent circumstances], we have consistently held that the entry into a home to conduct a search or make an arrest is unreasonable under the Fourth Amendment unless done pursuant to a warrant"); *id.*, at 213–214 ("In the absence of exigent circumstances, we have consistently held that such judicially untested determinations are not reliable enough to justify an entry into a person's home to arrest him without a warrant, or a search of a home for objects in the absence of a search warrant. . . . We see no reason to depart from this settled course when the search of a home is for person rather than an object"); *id.*, at 216 ("Since warrantless searches of a home are impermissible absent consent or exigent circumstances, we conclude that the instant search violated the Fourth Amendment"); *id.*, at 219 ("[I]f anything, the little guidance that can be gleaned from common-law authorities undercuts the Government's position. The language of *Semayne's Case*, [5 Co. Rep. 91a, 77 Eng. Rep. 194 (K. B. 1603)] . . . suggests that although the subject of an arrest warrant could not find sanctuary in the home of the third party, the home remained a 'castle or privilege' for its residents. Similarly several [common law] commentators suggested that a search warrant, rather than an arrest warrant, was necessary to fully insulate a constable from an action for trespass brought by a party whose home was searched");

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Similarly, if we view the question of municipal liability from the perspective of the legislature that enacted the Klu Klux Act of 1871, the answer is clear. The legislative history indicating that Congress did not intend to impose civil liability on municipalities for the conduct of third parties, *ante* at 8–9, and n. 7, merely confirms the view that it did intend to impose liability for the governments' own illegal acts—including those acts performed by their agents in the course of their employment. In other words, as I explained in my dissent in *Oklahoma City* v. *Tuttle*, 471 U. S. ——, —— (1985), both the broad remedial purpose of the statute and the fact that it embodied contemporaneous common law doctrine, including *respondeat superior*, require a conclusion that Congress intended that a governmental entity be liable for the constitutional deprivations committed by its agents in the course of their duties.[4]

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id., at 220 ("[T]he history of the Fourth Amendment strongly suggests that its Framers would not have sanctioned the instant search").

The fact that the Sixth Circuit and two other Circuits had reached a contrary conclusion does not transform *Steagald* into a nonretroactive opinion. This Court has never suggested that resolution of a split in the Circuits somehow means that a holding is presumptively nonretroactive in the Circuits that have disagreed with the Court's ultimate conclusion. Furthermore, the suggestion that there is a more compelling need for non-retroactivity in a civil context than in a criminal context, *post*, at 2–6 (POWELL, J., dissenting) ignores the fact that, in a civil context, there is not the societal cost of reversing convictions. Cf. *Johnson* v. *New Jersey*, 384 U. S. 719, 731 (1966) ("retroactive application of *Escobedo* and *Miranda* would seriously disrupt the administration of our criminal laws. It would require the retrial or release of numerous prisoners found guilty by trustworthy evidence in conformity with previously announced constitutional standards"). Additionally, *Payton* v. *New York*, 445 U. S. 573 (1980), which *Steagald* cites and discusses, has, of course, been held retroactive in the only context in which the Court has considered the issue. See *United States* v. *Johnson*, 457 U. S. 537 (1982).

[4] Several commentators have concluded that the dicta in *Monell* v. *New York City Dept. of Social Services*, 436 U. S. 658 (1978), regarding *respondeat superior* misreads the legislative history of § 1983. See, *e. g.*, Blum, From *Monroe* to *Monell*: Defining the Scope of Municipal Liability

Finally, in construing the scope of § 1983, the Court has sometimes referred to "considerations of public policy."[5] To the extent that such "policy" concerns are relevant, they also support a finding of County liability. A contrary construction would produce a most anomalous result. The primary responsibility for protecting the constitutional rights of the residents of Hamilton County from the officers of Hamilton County should rest on the shoulders of the County itself, rather than on the several agents who were trying to perform their jobs. Although I recognize that the County may provide insurance protection for its agents, I believe that the primary party against whom the judgment should run is the County itself. The County has the resources and the author-

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in Federal Courts, 51 Temp. L.Q. 409, 413, n. 15 (1978) ("The interpretation adopted by the Court with respect to the rejection of vicarious liability under § 1983 had been espoused prior to *Monell* by one author who drew a distinction between 'political' § 1983 cases, in which a city itself causes the constitutional violation, and 'constitutional tort' § 1983 cases, in which an attempt is made to impose vicarious liability on the city for the misconduct of its employees. . . . Although this view of § 1983 may represent a sensitive response to the fiscal plight of municipal corporations today, it should not be acknowledged as a legitimate interpretation of congressional intent in 1871"); Note, Section 1983 Municipal Liability and the Doctrine of Respondeat Superior, 46 U. Chi. L. Rev. 935, 936 (1979) ("the purposes and legislative history of the provision demand a scheme of respondeat superior liability"); Note, *Monell v. Department of Social Services:* One Step Forward and A Half Step Back for Municipal Liability Under Section 1983, 7 Hofstra L. Rev. 893, 921 (1979) ("Analysis of the legislative history of section 1983 does not indicate that Congress intended to exclude respondeat superior from the act. The language of the statute similarly offers no such proof. Since both were relied on by the Court in *Monell*, the dicta in that decision is, at best, poorly reasoned authority for the proposition that a municipality is not liable for the unauthorized acts of its employees"); Comment, Municipal Liability under Section 1983 for Civil Rights Violations After *Monell*, 64 Iowa L. Rev. 1032, 1045 (1979) ("The Court's [respondeat superior] limitation . . . is not justified by the legislative history of section 1983 or by policy considerations").

[5] *Newport* v. *Fact Concerts, Inc.*, 453 U. S. 247, 266 (1981); *Owen* v. *City of Independence*, 445 U. S. 622, 650 (1980).

ity that can best avoid future constitutional violations and provide a fair remedy for those that have occurred in the past. Thus, even if "public policy" concerns should inform the construction of § 1983, those considerations, like the statute's remedial purpose and common law background, support a conclusion of County liability for the unconstitutional, axe-swinging entry in this case.

Because I believe that Parts I, II–A, and II–C are consistent with the purpose and policy of § 1983, as well as with our precedents, I join those parts of the Court's opinion[*] and concur in the judgment.

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[*] The reasons for my not joining Parts II and IV of *Monell*, 436 U. S. at 714 (STEVENS, J., concurring in part), are also applicable to my decision not to join Part II–B of this opinion.

SUPREME COURT OF THE UNITED STATES

No. 84-1160

BERTOLD J. PEMBAUR, PETITIONER *v.* CITY OF CINCINNATI ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

[March 25, 1986]

JUSTICE O'CONNOR, concurring in part and concurring in the judgment.

For the reasons stated by JUSTICE WHITE, I agree that the municipal officers here were acting as policy makers within the meaning of *Monell* v. *New York City Dept. of Social Services*, 436 U. S. 658 (1978). As the City of Cincinnati freely conceded, forcible entry of third-party property to effect an arrest was standard operating procedure in May, 1977. Given that this procedure was consistent with federal, state and local law at the time the case arose, it seems fair to infer that respondent county's policy was no different. Moreover, under state law as definitively construed by the Court of Appeals, the county officials who opted for the forcible entry "had the authority to approve or disapprove such entries." *Ante*, at —— (WHITE J., concurring). Given this combination of circumstances, I agree with JUSTICE WHITE that the decision to break down the door "sufficiently manifested county policy to warrant reversal of the judgment below." *Id.*, at ——. Because, however, I believe that the reasoning of the majority goes beyond that necessary to decide the case, and because I fear that the standard the majority articulates may be misread to expose municipalities to liability beyond that envisioned by the Court in *Monell*, I join only parts I and IIA of the Court's opinion and the judgment.

SUPREME COURT OF THE UNITED STATES

No. 84–1160

BERTOLD J. PEMBAUR, PETITIONER *v.* CITY OF CINCINNATI ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

[March 25, 1986]

Justice Powell, with whom The Chief Justice and Justice Rehnquist join, dissenting.

The Court today holds Hamilton County liable for the forcible entry in May 1977 by deputy sheriffs into petitioner's office. The entry and subsequent search were pursuant to capiases for third parties—petitioner's employees—who had failed to answer a summons to appear as witnesses before a grand jury investigating petitioner. When petitioner refused to allow the sheriffs to enter, one of them, at the request of his supervisor, called the office of the County Prosecutor for instructions. The Assistant County Prosecutor received the call, and apparently was in doubt as to what advice to give. He referred the question to the County Prosecutor, who advised the deputy sheriffs to "go in and get them" [the witnesses] pursuant to the capiases.

This five word response to a single question over the phone is now found by this Court to have created an official county policy for which Hamilton County is liable under § 1983. This holding is wrong for at least two reasons. First, the prosecutor's response and the deputies' subsequent actions did not violate any constitutional right that existed at the time of the forcible entry. Second, no official county policy could have been created solely by an off-hand telephone response from a busy County Prosecutor.

I

Petitioner's allegation of a constitutional violation rests exclusively on *Steagald* v. *United States*, 451 U. S. 204 (1981), decided four years after the entry here. In *Steagald* we held that an officer may not search for the subject of an arrest warrant in a third party's home without first obtaining a search warrant, unless the search is consensual or justified by exigent circumstances. In 1977, the law in the Sixth Circuit was that a search warrant was not required in such situations if the police had an arrest warrant and reason to believe that the person to be arrested was within the home to be searched. *United States* v. *McKinney*, 379 F. 2d 259, 262–263 (CA6 1967). That view was shared by at least two other circuits. See *United States* v. *Gaultney*, 606 F. 2d 540, 544–545 (CA5 1979); *United States* v. *Harper*, 550 F. 2d 610, 612–614 (CA10), cert. denied, 434 U. S. 837 (1977). Another circuit had favored that view in *dicta*. See *United States* v. *Manley*, 632 F. 2d 978, 983 (CA2 1980). Thus, under the governing law in the applicable circuit, uncontradicted by any opinion of this Court, the entry into petitioner's office pursuant to an arrest warrant was not a violation of petitioner's Fourth Amendment rights.

The only way to transform this search—legitimate at the time—into a constitutional violation is to apply *Steagald* retroactively. This would not be a startling proposition if all that petitioner sought was retroactive application of a new rule of criminal law to a direct appeal from his criminal conviction.[1] But petitioner seeks something very different—

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[1] In fact, on direct appeal from his criminal conviction, petitioner did enjoy retroactive application of the rule in *Steagald*, although it did not entitle him to reversal of his conviction. *State* v. *Pembaur*, 9 Ohio St. 3d 136, 459 N. E. 2d 217 (1984). While the Ohio Supreme Court did not specifically address the retroactivity issue, it did discuss the applicability of *Steagald* to petitioner's criminal appeal. 459 N. E. 2d, at 218–219. The court reasoned, however, that because no "substantive" offense was involved, but only a conviction for obstructing the police, petitioner could not

retroactive application of the new rule of criminal law announced in *Steagald* to his subsequent civil lawsuit. Even if one accepts the proposition that a new rule of criminal law should be applied retroactively to create a basis for civil liability under § 1983,[2] existing principles of retroactivity for civil cases show that *Steagald* should not be applied retroactively to this action.

The leading case explaining the framework of analysis for civil retroactivity is *Chevron Oil Co.* v. *Huson*, 404 U. S. 97 (1971). Under *Chevron*, a court must assess: (i) whether the new decision "establish[ed] a new principle of law . . . by overruling clear past precendent . . . or by deciding an issue of first impression whose resolution was not clearly foreshadowed," *id.*, at 106; (ii) "the prior history of the rule in question, its purpose and effect, and whether retroactive operation will further or retard its operation," *id.*, at 107; and (iii) the respective inequities of retroactive or nonretroactive application, *ibid.*

When viewed in light of these factors, retroactive application of *Steagald* is not justified. First, *Steagald* overruled past court of appeals precedent, and the decision had not been foreshadowed in opinions of this Court. The governing law in three federal circuits permitted searches of third par-

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rely on the unconstitutionality of the search as a defense. 459 N. E. 2d, at 219.

[2] If new criminal rules are so applied, it is possible that a person could obtain the benefit of retroactive application of a new criminal rule to his civil § 1983 case, even though he could not use the new rule to attack his conviction collaterally. A prisoner literally could be forced to remain in prison while collecting his civil damage award. In *Shea* v. *Louisiana*, 105 S. Ct. 1065 (1985) the Court created a distinction between retroactivity on direct review of a conviction and on collateral attack of a conviction that has become final. On collateral attack the principles of *Solem* v. *Stumes*, 465 U. S. 638 (1984) apply, which make it less likely that a new rule would be applied retroactively. A key factor under *Stumes* is the extent of the reliance by law enforcement authorities on the old standards. 465 U. S., at 643.

ties' homes pursuant to an arrest warrant, see *supra*, at ——, and earlier decisions of this Court arguably supported such searches.[3] Second, the "purpose" of *Steagald* was to clarify the application of the Fourth Amendment to such searches, not to provide for money damages. Finally, retroactive application of *Steagald* in this context would produce substantial inequitable results by imposing liability on local government units for law enforcement practices that were legitimate at the time they were undertaken. See *Griffin* v. *Illinois*, 351 U. S. 12, 26 (1956) (Frankfurter, J., concurring in the judgment) ("We should not indulge in the fiction that the law now announced has always been the law . . . ."). Civil liability should not attach unless there was notice that a constitutional right was at risk. *Procunier* v. *Navarette*, 434 U. S. 555, 562 (1978).

We ought to be even more wary of applying new rules of Fourth Amendment law retroactively to civil cases than we are with new rules of civil law. The primary reason for imposing § 1983 liability on local government units is deterrence, so that if there is any doubt about the constitutionality of their actions, officials will "err on the side of protecting citizens' rights." *Owen* v. *City of Independence*, 445 U. S. 622, 656 (1980). But law enforcement officials, particularly prosecutors, are in a much different position with respect to deterrence than other local government officials. *Cf. Imbler* v. *Pachtman*, 424 U. S. 409, 425 (1976). Their affirmative duty to enforce the law vigorously often requires them to take actions that legitimately intrude on individual liberties, often acting "under serious constraints of time and even information." *Ibid.* While law enforcement officials, as much as any other official, ought to "err on the side of protecting citizens' rights" when they have legitimate doubts about the constitutionality of their actions, they should not be deterred from doing their duty to enforce the criminal law when they have no such doubts. In this case, for example, Sixth Circuit law expressly authorized the prosecutor's decision. Because a court engages in the same balancing of interests in a Fourth Amendment case that is required, with much less deliberation, of law enforcement officials, they are justified in relying on the judgment of the applicable federal court. Under these circumstances, there was nothing that should have caused the officials to "harbor doubts about the lawfulness of their intended actions," *Owen, supra,* at 652, and therefore nothing to deter.

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[3] In *Dalia* v. *United States*, 441 U. S. 238 (1979), the Court rejected the argument that a separate search warrant was required before police could enter a business office to install an eavesdropping device when officers already had a warrant authorizing the eavesdropping itself. The Court noted that "in executing a warrant the police may find it necessary to interfere with privacy rights not explicitly considered by the judge who issued the warrant." *Id.*, at 257. In *Payton* v. *New York*, 445 U. S. 573 (1980), the Court rejected the suggestion that a separate search warrant was required before police could execute an arrest warrant by entering the home of the subject of the warrant.

Moreover, there is a significant cost to unwarranted deterrence of law enforcement officials. We recognized in *Imbler* a strong state interest in "vigourous and fearless" prosecution, and found that to be "essential to the proper functioning of the criminal justice system." 424 U. S., at 427–428. Those same general concerns apply to other law enforcement officials. Unwarranted deterrence has the undesirable effect of discouraging conduct that is essential to our justice system and protects the state's interest in public safety. In that sense, this case is different from *Owen.* It is no answer to say that some officials are entitled either to absolute or qualified immunity. It ignores reality to say that if petitioner is successful in his twenty million dollar suit it will not have a chilling effect on law enforcement practices in Hamilton County.[4]

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[4] JUSTICE STEVENS misunderstands the unique posture of this case. This is not a question of retroactivity of a new civil rule to civil cases versus retroactivity of a new criminal rule to criminal cases. The special concerns discussed in the text above arise in part out of the retroactive application of

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For these reasons, *Steagald* should not be applied retroactively. Consequently, petitioner has no constitutional violation of which to complain. I therefore would affirm the decision of the Court of Appeals.[5]

II

Even if *Steagald* is applied retroactively, petitioner has failed to demonstrate the existence of an official policy for which Hamilton County can be liable. The action said to have created policy here was nothing more than a brief response to a single question over the telephone. The deputy sheriffs sought instructions concerning a situation that had never occurred before, at least in the memory of the participants. *Ante*, at ——. That in itself, and the fact that the Assistant Prosecutor had to obtain advice from the County Prosecutor, strongly indicate that no prior policy had been formed. Petitioner therefore argues that the County Pros-

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a new rule of criminal law to civil cases. I see little to be gained by comparing the societal costs of civil and criminal retroactivity, *see* concurring opinion of STEVENS, J., *ante*, at 3, n. 3, because they can be severe in either case. Today's opinion could result in even a non-negligent mistake in judgment imposing heavy liability on units of local government, especially now in view of the sky-rocketing cost—or unavailability—of liability insurance. See also *Malley* v. *Briggs*, —— U. S. —— (1985).

[5] The Court's only response to these concerns is to note that respondent has "never challenged and has in fact also conceded that *Steagald* applied retroactively to this case. . . . We decide this case in light of respondent's concessions." *Ante*, at ——, n. 5. The retroactivity issue, however, is central to this case. We need not reach the difficult federal issues in this case if the Court correctly resolved *Steagald*'s retroactivity. Nor are we prevented from doing so by any actual concession of the respondent. See Tr. of Oral Arg. 26–27. JUSTICE WHITE does not address the retroactivity of *Steagald* on the ground that the county had not relied on this contention. In my view, although we need not address this retroactivity issue, there is no question as to our right to do so—especially in view of the unfairness of holding the respondent liable for not anticipating *Steagald*. *Procunier* v. *Navarette*, 434 U. S. 555, 559, n. 6 (1978); *Blonder-Tongue Laboratories, Inc.* v. *University of Illinois Foundation*, 402 U. S. 313, 320, n. 6 (1971).

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ecutor's reaction *in this case* formed county policy. The sparse facts supporting petitioner's theory—adopted by the Court today—do not satisfy the requirement in *Monell* v. *New York City Dept. of Social Services*, 436 U. S. 658, 691 (1978) that local government liability under § 1983 be imposed only when the injury is caused by government policy.

A

Under *Monell*, local government units may be liable only when "the action that is alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers." 436 U. S., at 690. This case presents the opportunity to define further what was meant in *Monell* by "official policy." Proper resolution of the case calls for identification of the applicable principles for determining when policy is created. The Court today does not do this, but instead focuses almost exclusively on the status of the decisionmaker. Its reasoning is circular: it contends that policy is what policymakers make, and policymakers are those who have authority to make policy.

The Court variously notes that if a decision "is properly made by that government's authorized decisionmakers, it surely represents an act of official government 'policy' as that term is commonly understood," *ante*, at ——, and that "where action is directed by those who establish governmental policy, the municipality is equally responsible . . . ," *ibid.* Thus, the Court's test for determining the existence of policy focuses only on whether a decision was made "by the official or officials responsible for establishing final policy with respect to the subject matter in question." *Ante*, at ——.

In my view, the question whether official policy—in any normal sense of the term—has been made in a particular case is not answered by explaining who has final authority to make policy. The question here is not "*could* the county prosecutor make policy?" but rather, "*did* he make policy?" By focusing on the authority granted to the official under state law, the Court's test fails to answer the key federal question presented. The Court instead turns the question into one of state law. Under a test that focuses on the authority of the decisionmaker, the Court has only to look to state law for the resolution of this case. Here the Court of Appeals found that "both the County Sheriff and the County Prosecutor had authority under Ohio law to establish county policy under appropriate circumstances." *Ante*, at ——. Apparently that recitation of authority is all that is needed under the Court's test because no discussion is offered to demonstrate that the Sheriff or the Prosecutor actually used that authority to establish official county policy in this case.

Moreover, the Court's reasoning is inconsistent with *Monell*. Today's decision finds that policy is established because a policymaking official made a decision on the telephone that was within the scope of his authority. The Court ignores the fact that no business organization or governmental unit makes binding policy decisions so cavalierly. The Court provides no mechanism for distinguishing those acts or decisions that cannot fairly be construed to create official policy from the normal process of establishing an official policy that would be followed by a responsible public entity. Thus, the Court has adopted in part what it rejected in *Monell:* local government units are now subject to *respondeat superior* liability, at least with respect to a certain category of employees, *i. e.*, those with final authority to make policy. See *Monell*, 436 U. S., at 691; see also *City of Oklahoma City* v. *Tuttle*, —— U. S. ——, —— (1985) (rejecting theories akin to *respondeat superior*) (plurality opinion). The Court's reliance on the status of the employee carries the concept of "policy" far beyond what was envisioned in *Monell*.

B

In my view, proper resolution of the question whether official policy has been formed should focus on two factors: (i) the nature of the decision reached or the action taken, and (ii) the process by which the decision was reached or the action was taken.

Focusing on the nature of the decision distinguishes between policies and mere *ad hoc* decisions. Such a focus also reflects the fact that most policies embody a rule of general applicability. That is the tenor of the Court's statement in *Monell* that local government units are liable under § 1983 when the action that is alleged to be unconstitutional "implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers." 436 U. S., at 690. The clear implication is that policy is created when a rule is formed that applies to all similar situations—a "governing principle [or] plan." Webster's New Twentieth Century Dictionary 1392 (2d ed. 1979).[6] When a rule of general applicability has been approved, the government has taken a position for which it can be held responsible.[7]

Another factor indicating that policy has been formed is the process by which the decision at issue was reached. Formal procedures that involve, for example, voting by elected officials, prepared reports, extended deliberation or official records indicate that the resulting decisions taken "may fairly be said to represent official policy," *Monell*, 436 U. S., at 694. *Owen* v. *City of Independence*, 445 U. S. 622 (1980), provides an example. The city council met in a regularly scheduled meeting. One member of the council made a motion to release to the press certain reports that cast an employee in a bad light. After deliberation, the council passed the motion with no dissents and one abstention. 445 U. S., at 627–629. Although this official action did not establish a rule of general applicability, it is clear that policy was formed because of the process by which the decision was reached.

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[6] The focus on a rule of general applicability does not mean that more than one instance of its application is required. The local government unit may be liable for the first application of a duly constituted unconstitutional policy.

[7] An example of official policy in the form of a rule of general applicability is *City of Newport* v. *Fact Concerts, Inc.*, 453 U. S. 247 (1981). While the Court in that case was not called on to define the scope of the word "policy," the complaint was based on a rule of general applicability. The City canceled a scheduled concert pursuant to its rule of not allowing rock concerts. Plaintiffs alleged that the general rule against rock concerts violated their First Amendment rights. Even if the cancellation was the first implementation of the rule, it was clear that the City had committed itself to a general position that would govern future cases.

Applying these factors to the instant case demonstrates that no official policy was formulated. Certainly, no rule of general applicability was adopted. The Court correctly notes that the Sheriff "testified that the Department had no written policy respecting the serving of capiases on the property of third persons and that the proper response in any given situation would depend upon the circumstances." *Ante*, at ——. Nor could he recall a specific instance in which entrance had been denied and forcibly gained. The Court's result today rests on the implicit conclusion that the Prosecutor's response—"go in and get them"—altered the prior case-by-case approach of the Department and formed a new rule to apply in all similar cases. Nothing about the Prosecutor's response to the inquiry over the phone, nor the circumstances surrounding the response, indicates that such a rule of general applicability was formed.[8]

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[8] There is nothing in the record to support the inference relied on by JUSTICES WHITE and O'CONNOR. Nor has this Court ever held that because a policy has been adopted by one city or county we may *assume* that a similar policy has been adopted by neighboring cities or counties. After all, the city and county in this case are separate governmental entities.

Moreover, and again contrary to the views of my colleagues, this Court has never held—at least to my knowledge—that we may assume that simply because certain conduct is permitted by existing law, it must have been adopted as county policy. The undisputed facts in this case refute these *assumptions* by JUSTICES WHITE and O'CONNOR. Neither the sheriffs who had been denied entry nor the assistant county prosecutor knew of any such policy. Otherwise, one of the sheriffs would not have called the prosecutor's office, and certainly the assistant prosecutor would not have

Similarly, nothing about the way the decision was reached indicates that official policy was formed. The prosecutor, without time for thoughtful consideration or consultation, simply gave an off-the-cuff answer to a single question. There was no *process* at all. The Court's holding undercuts the basic rationale of *Monell*, and unfairly increases the risk of liability on the level of government least able to bear it. I dissent.

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thought it necessary to put the question to the prosecutor. Nor did the prosecutor, when asked, say that the county's policy was to force an entry when necessary to serve a valid arrest warrant. Rather, he simply said "Go in and get them"—the sort of spontaneous reply that a busy official might make quite thoughtlessly. As noted above, the Sheriff testified that the proper response would depend on the circumstances.

COMPLETED

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ORIGINAL

(Slip Opinion)

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Lumber Co.*, 200 U. S. 321, 337.

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Syllabus

TEXAS *v.* McCULLOUGH

CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF TEXAS

No. 84–1198. Argued December 10, 1985—Decided February 26, 1986

Respondent was tried before a jury in a Texas District Court and convicted of murder. He elected to be sentenced by the jury, as was his right under Texas law, and the jury imposed a 20-year sentence. The trial judge then granted respondent's motion for a new trial on the basis of prosecutorial misconduct. Respondent was retried before a jury, with the same trial judge presiding, and again was found guilty. This time he elected to have the judge fix his sentence, and she imposed a 50-year sentence. To justify the longer sentence, the judge entered the following findings of fact: the testimony of two state witnesses who had not testified at the first trial added to the credibility of the State's key witness and detracted from the credibility of respondent and a defense witness; the two new witnesses' testimony directly implicated respondent in the commission of the murder and shed new light upon his life and conduct; and it was learned for the first time on retrial that respondent had been released from prison only four months before the murder. The Texas Court of Appeals reversed and sentenced respondent to 20 years' imprisonment, considering itself bound by *North Carolina* v. *Pearce*, 395 U. S. 711, wherein it was held that the Due Process Clause of the Fourteenth Amendment prevented increased sentences on retrial when the increase was motivated by the sentencing judge's vindictiveness, and that to show the absence of vindictiveness the reasons for imposing the increased sentence must affirmatively appear. The Texas Court of Criminal Appeals, while holding that, as a matter of procedure, the case should have been remanded to the trial judge for resentencing, also held that under *Pearce* vindictiveness must be presumed even though a jury had fixed punishment at the first trial and a judge had fixed it at the second trial.

Held: The Due Process Clause was not violated by the trial judge's imposition of a greater sentence on retrial. Pp. 3–10.

Syllabus

(a) The facts of this case provide no basis for a *Pearce* presumption of vindictiveness. In contrast to *Pearce*, respondent's second trial came about because the trial judge herself concluded that the prosecutor's misconduct required it. Granting respondent's motion for new trial hardly suggests any vindictiveness on the judge's part toward him. The presumption is also inapplicable because different sentencers assessed the varying sentences, the second sentencer providing an on-the-record, logical, nonvindictive reason for the longer sentence. Pp. 3–6.

(b) Even if the *Pearce* presumption were to apply here the trial judge's findings on imposing the longer sentence overcame that presumption. Those findings clearly constituted "objective information justifying the increased sentence," *United States* v. *Goodwin*, 457 U. S. 368, 375. Pp. 6–10.

—— S. W. 2d ——, reversed and remanded.

BURGER, C. J., delivered the opinion of the Court, in which WHITE, POWELL, REHNQUIST, and O'CONNOR, JJ., joined. BRENNAN, J., filed an opinion concurring in the judgment. MARSHALL, J., filed a dissenting opinion, in which BLACKMUN and STEVENS, JJ., joined.

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D. C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

No. 84-1198

TEXAS, PETITIONER *v.* SANFORD JAMES McCULLOUGH

ON WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF TEXAS

[February 26, 1986]

CHIEF JUSTICE BURGER delivered the opinion of the Court.

We granted certiorari to decide whether the Due Process Clause was violated when the defendant in a state court received a greater sentence on retrial where the earlier sentence was imposed by the jury, the trial judge granted the defendant's motion for a new trial, the defendant requested that in the second trial the judge fix the sentence, and the judge entered findings of fact justifying the longer sentence.

I

In 1980, Sanford James McCullough was tried before a jury in the Randall County, Texas, District Court and convicted of murder. McCullough elected to be sentenced by the jury, as was his right under Texas law. Tex. Code Crim. Proc. Ann., Art. 37.07 (Vernon 1981). The jury imposed a 20-year sentence. Judge Naomi Harney, the trial judge, then granted McCullough's motion for a new trial on the basis of prosecutorial misconduct.

Three months later, McCullough was retried before a jury, with Judge Harney again presiding. At this trial, the State presented testimony from two witnesses who had not testified at the first trial that McCullough rather than his accomplices had slashed the throat of the victim. McCullough was again found guilty by a jury. This time, he elected to have his sentence fixed by the trial judge. Judge Harney sentenced McCullough to 50 years in prison and, upon his motion, made findings of fact as to why the sentence was longer than that fixed by the jury in the first trial. She found that in fixing the sentence she relied on new evidence about the murder that was not presented at the first trial and hence never made known to the sentencing jury. The findings focused specifically on the testimony of two new witnesses, Carolyn Hollison McCullough and Willie Lee Brown, which "had a direct effect upon the strength of the State's case at both the guilt and punishment phases of the trial." App. to Pet. for Cert. A–23. In addition, Judge Harney explained that she learned for the first time on retrial McCullough had been released from prison only four months before the later crime had been committed. *Ibid.* Finally, the judge candidly stated that, had she fixed the first sentence, she would have imposed more than twenty years. *Id.*, at A–24.[1]

On appeal, the Texas Court of Appeals reversed and resentenced McCullough to 20 years' imprisonment. 680 S. W. 2d 493 (1983). That court considered itself bound by this Court's decision in *North Carolina* v. *Pearce*, 395 U. S. 711 (1969), and held that a longer sentence upon retrial could be imposed only if it was based upon conduct of the defendant occurring after the original trial.[2] Petitioner sought review in the Texas Court of Criminal Appeals, and that court limited its review to whether the Texas Court of Appeals had authority to limit respondent's sentence to 20 years. The court concluded that, as a matter of procedure, the case should have been remanded to the trial judge for resentencing. On petitioner's motion for rehearing, the court concluded that under *Pearce* vindictiveness must be presumed even though a jury had fixed punishment at the first trial and a judge had fixed it at the second trial. We granted certiorari. 472 U. S. —— (1985). We reverse.

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[1] Later Judge Harney sentenced two other defendants for their role in the same murder. She gave both defendants 50 year sentences identical to McCullough's.

[2] The Texas Court of Appeals in applying *Pearce* observed:

"This case demonstrates the excessive scope of *Pearce*. The trial judge filed detailed and valid reasons for the heavier punishment and there is nothing in the record to indicate that the increased punishment resulted from vindictiveness. However, the reasons affirmatively supported by evidence are based on events occurring during or after the crime but before the first trial. Although those matters were not brought out at the first trial, they cannot be used [under *Pearce*] to increase punishment because none occurred *after* the first trial." 680 S. W. 2d, at 496, n. 2.

II

In *North Carolina* v. *Pearce, supra,* the Court placed a limitation on the power of a sentencing authority to increase a sentence after reconviction following a new trial. It held that the Due Process Clause of the Fourteenth Amendment prevented increased sentences when that increase was motivated by vindictiveness on the part of the sentencing judge. The Court stated:

> "Due process of law, then, requires that vindictiveness against a defendant for having successfully attacked his first conviction must play no part in the sentence he receives after a new trial. And since the fear of such vindictiveness may unconstitutionally deter a defendant's exercise of the right to appeal or collaterally attack his first conviction, due process also requires that a defendant be freed of apprehension of such a retaliatory motivation on the part of the sentencing judge.
>
> "In order to assure the absence of such a motivation, we have concluded that whenever a judge imposes a more severe sentence upon a defendant after a new trial, *the reasons for his doing so must affirmatively appear.*" *Id.*, at 725–726 (emphasis added).

Beyond doubt, vindictiveness of a sentencing judge is the evil the Court sought to prevent rather than simply enlarged sentences after a new trial. The *Pearce* requirements thus do not apply in every case where a convicted defendant receives a higher sentence on retrial. Like other "judicially created means of effectuating the rights secured by the [Constitution]," *Stone* v. *Powell*, 428 U. S. 465, 482 (1976), we have restricted application of *Pearce* to areas where its "objectives are thought most efficaciously served," 428 U. S., at 487. Accordingly, in each case, we look to the need, under the circumstances, to "guard against vindictiveness in the resentencing process." *Chaffin* v. *Stynchcombe*, 412 U. S. 17, 25 (1973) (emphasis omitted). For example, in *Moon* v. *Maryland*, 398 U. S. 319 (1970), we held that *Pearce* did not apply when the defendant conceded and it was clear that vindictiveness had played no part in the enlarged sentence. In *Colten* v. *Kentucky*, 407 U. S. 104 (1972), we saw no need for applying the presumption when the second court in a two-tier trial system imposed a longer sentence. In *Chaffin*, *supra*, we held *Pearce* not applicable where a *jury* imposed the increased sentence on retrial. Where the prophylactic rule of *Pearce* does not apply, the defendant may still obtain relief if he can show actual vindictiveness upon resentencing. *Wasman* v. *United States*, 468 U. S. ——, —— (1984).

The facts of this case provide no basis for a presumption of vindictiveness. In contrast to *Pearce*, McCullough's second trial came about because the trial judge herself concluded that the prosecutor's misconduct required it. Granting McCullough's motion for a new trial hardly suggests any vindictiveness on the part of the judge towards him. "[U]nlike the judge who has been reversed," the trial judge here had "no motivation to engage in self-vindication." *Chaffin*, 412 U. S., at 27. In such circumstances, there is also no justifiable concern about "institutional interests that might occasion higher sentences by a judge desirous of discouraging what he regards as meritless appeals." *Ibid.* In granting McCullough's new trial motion, Judge Harney went on record as agreeing that his "claims" had merit. Presuming vindictiveness on this basis alone would be tantamount to presuming that a judge will be vindictive towards a defendant merely because he seeks an acquittal. Thus, in support of its position, the dissent conjures up visions of judges who view defendants as temerarious for filing motions for new trials, *post*, at 7, and who are "annoyed" at being forced "to sit through . . . trial[s] whose result[s] [are] foregone conclusions," *post*, at 6. We decline to adopt the view that the judicial temperament of our Nation's trial judges will suddenly change upon the filing of a successful post-trial motion. The presumption of *Pearce* does not apply in situations where the possibility of vindictiveness is this speculative, particularly since the presumption may often "operate in the absence of any proof of an improper motive and thus . . . block a legitimate response to criminal conduct," *United States* v. *Goodwin*, 457 U. S. 368, 373 (1982). Indeed, not even "apprehension of such a retaliatory motivation on the part of the sentencing judge," *Pearce*, 395 U. S., at 725, could be present in this case. McCullough was entitled by law to choose to be sentenced by either a judge or a jury. Faced with that choice, on retrial McCullough chose to be sentenced by Judge Harney. There can hardly be more emphatic affirmation of his appraisal of Judge Harney's fairness than this choice. Because there was no realistic motive for vindictive sentencing, the *Pearce* presumption was inappropriate.

The presumption is also inapplicable because different sentencers assessed the varying sentences that McCullough received. In such circumstances, a sentence "increase" cannot truly be said to have taken place. In *Colten* v. *Kentucky*, *supra*, which bears directly on this case, we recognized that when different sentencers are involved,

> "[i]t may often be that the [second sentencer] will impose a punishment more severe than that received from the [first]. But it no more follows that such a sentence is a vindictive penalty for seeking a [new] trial than that the [first sentencer] imposed a lenient penalty." *Id.*, at 117.

Here, the second sentencer provides an on-the-record, wholly logical, nonvindictive reason for the sentence. We read *Pearce* to require no more particularly since trial judges must be accorded broad discretion in sentencing, see *Wasman, supra*, at ——.

In this case, the trial judge stated candidly her belief that the 20-year sentence respondent received initially was unduly lenient in light of significant evidence not before the sentencing jury in the first trial. On this record, that appraisal cannot be faulted. In any event, nothing in the Constitution prohibits a state from permitting such discretion to play a role in sentencing.[3]

III

Even if the *Pearce* presumption were to apply here, we hold that the findings of the trial judge overcome that presumption. Nothing in *Pearce* is to be read as precluding a rebuttal of intimations of vindictiveness. As we have explained, *Pearce* permits "a sentencing authority [to] justify an increased sentence by affirmatively identifying relevant conduct or events that occurred subsequent to the original sentencing proceedings." *Wasman*, 468 U. S., at ——; see also *id.*, at —— (POWELL, J., concurring in part and concurring in judgment). This language, however, was never intended to describe exhaustively all of the possible circumstances in which a sentence increase could be justified. Restricting justifications for a sentence increase to *only* "events that occurred subsequent to the original sentencing proceedings" could in some circumstances lead to absurd results. The Solicitor General provides the following hypothetical example:

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[3] *Pearce* itself apparently involved different judges presiding over the two trials, a fact that has led some courts to conclude by implication that the presumption of vindictiveness applies even where different sentencing judges are involved. See, *e. g.*, *United States* v. *Hawthorne*, 532 F. 2d 318, 323 (CA3), cert. denied, 429 U. S. 894 (1976). That fact, however, may not have been drawn to the Court's attention and does not appear anywhere in the Court's opinion in *Pearce*. Clearly the Court did not focus on it as a consideration for its holding. See *Hardwick* v. *Doolittle*, 558 F. 2d 292, 299 (CA5 1977), cert. denied, 434 U. S. 1049 (1978). Subsequent opinions have also elucidated the basis for the *Pearce* presumption. We held in *Chaffin* v. *Stynchcombe*, 412 U. S. 17 (1973), for instance, that the presumption derives from the judge's "personal stake in the prior conviction," *id.*, at 27, a statement clearly at odds with reading *Pearce* to answer the two-sentencer issue. We therefore decline to read *Pearce* as governing this issue. See also n. 4, *infra*.

> "Suppose . . . that a defendant is convicted of burglary, a non-violent, and apparently first, offense. He is sentenced to a short prison term or perhaps placed on probation. Following a successful appeal and a conviction on retrial, it is learned that the defendant has been using an alias and in fact has a long criminal record that includes other burglaries, several armed robbery convictions, and a conviction for murder committed in the course of a burglary. None of the reasons underlying *Pearce* in any way justifies the perverse result that the defendant receive no greater sentence in light of this information than he originally received when he was thought to be a first offender." Brief for United States as *Amicus Curiae* 26.

We agree with the Solicitor General and find nothing in *Pearce* that would require such a bizarre conclusion.[4] Per-whatever incidental deterrent effect they might have on the right to appeal." We see no reason to depart from this conclusion.

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[4] The dissent contends that this objection "was considered in *Pearce* and rejected there." *Post*, at 11. In fact, the issue, like the two-sentencer issue just discussed, was not before the Court because in neither *Pearce* nor its companion case did the State offer "any reason or justification" for the increased sentence. 395 U. S., at 726. Moreover, *Pearce* was argued on the assumption that the Constitution either absolutely forbade or permitted increased sentences on retrial. None of the briefs advanced the intermediate position ultimately relied upon by the Court that the Constitution permits increased sentences only in certain circumstances. Cf. Brief for American Civil Liberties Union et al. as *Amici Curiae* in *North Carolina* v. *Pearce*, O. T. 1968, No. 413, pp. 8–10 (quoted *post*, at 11–12) (arguing that "[t]o subject an accused to the risk of harsher punishment . . . as a condition of appeal . . . is an unconstitutional condition which violates the Due Process Clauses of the Fifth and Fourteenth Amendments"). Thus, as the Solicitor General points out, "in formulating the standard set forth in

It is clear that the careful explanation by the trial judge for the sentence imposed here fits well within our prior holdings. Judge Harney relied on the testimony of two new witnesses which she concluded "had a direct effect upon the strength of the State's case at both the guilt and punishment phases of the trial." App. to Pet. for Cert. A–23. The judge supported this conclusion with specific findings, noting that "[t]he testimony [of the two new witnesses] added to the credibility of the State's key witness . . . and detracted from the credibility of Dennis McCullough and [respondent] who both testified for the defense." *Ibid.* The judge also found that "[t]he testimony of these two witnesses directly implicated the defendant in the commission of the murder in question and showed what part he played in committing the offense." *Id.*, at A–22. Finally, the judge concluded that their testimony "shed new light upon [McCullough's] life, conduct, and his mental and moral propensities." *Id.*, at A–23. These findings clearly constitute "objective information . . . justifying the increased sentence."

Judge Harney also found that McCullough had been released from confinement only four months before the murder, *ibid.*, another obviously relevant fact not before the sentencing jury in the first trial. We have recognized the state's legitimate interest "in dealing in a harsher manner with those who by repeated criminal acts have shown that they are simply incapable of conforming to the norms of society as established by its criminal law." *Rummel* v. *Estelle*, 445 U. S. 263, 276 (1980). A defendant who commits new crimes within four months of his release from prison clearly poses a greater danger to society than one who commits crimes less often. To foreclose reliance on the kind of pertinent new information developed in the second trial would be wholly incompatible with modern sentencing standards. This new obwhatever incidental deterrent effect they might have on the right to appeal." We see no reason to depart from this conclusion.

It is clear that the careful explanation by the trial judge for the sentence imposed here fits well within our prior holdings. Judge Harney relied on the testimony of two new witnesses which she concluded "had a direct effect upon the strength of the State's case at both the guilt and punishment phases of the trial." App. to Pet. for Cert. A–23. The judge supported this conclusion with specific findings, noting that "[t]he testimony [of the two new witnesses] added to the credibility of the State's key witness . . . and detracted from the credibility of Dennis McCullough and [respondent] who both testified for the defense." *Ibid.* The judge also found that "[t]he testimony of these two witnesses directly implicated the defendant in the commission of the murder in question and showed what part he played in committing the offense." *Id.*, at A–22. Finally, the judge concluded that their testimony "shed new light upon [McCullough's] life, conduct, and his mental and moral propensities." *Id.*, at A–23. These findings clearly constitute "objective information . . . justifying the increased sentence."

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In setting aside the second sentence, the Texas Court of Appeals recognized that the new information bore legitimately on the appropriate sentence to impose, but concluded, reluctantly, that *Pearce* precluded reliance on this information. It is appropriate that we clarify the scope and thrust of *Pearce*, and we do so here.

The case is remanded to the Texas Court of Criminal Appeals for further proceedings not inconsistent with this opinion.

Reversed and remanded.

SUPREME COURT OF THE UNITED STATES

No. 84-1198

TEXAS, PETITIONER *v.* SANFORD JAMES McCULLOUGH

ON WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF TEXAS

[February 26, 1986]

JUSTICE BRENNAN, concurring in the judgment.

After respondent was sentenced to twenty years imprisonment upon his conviction for murder, Judge Harney granted respondent's motion for a new trial based on prosecutorial misconduct. Under these circumstances, I believe that the possibility that an increased sentence upon retrial resulted from judicial vindictiveness is sufficiently remote that the presumption established in *North Carolina* v. *Pearce*, 395 U. S. 711 (1969), should not apply here. Because respondent has not shown that the fifty-year sentence imposed by Judge Harney after respondent's retrial resulted from actual vindictiveness for having successfully attacked his first conviction, I would reverse the judgment below.

I emphasize, however, that were I able to find that vindictiveness should be presumed here, I would agree with JUSTICE MARSHALL that "the reasons offered by Judge Harney [were] far from adequate to rebut any presumption of vindictiveness." *Post*, at 8. The Court's dictum to the contrary, see *ante*, at 6–9, serves in my view only to distort the holding of *Pearce*.

SUPREME COURT OF THE UNITED STATES

No. 84-1198

TEXAS, PETITIONER *v.* SANFORD JAMES McCULLOUGH

ON WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF TEXAS

[February 26, 1986]

JUSTICE MARSHALL, with whom JUSTICE BLACKMUN and JUSTICE STEVENS join, dissenting.

With little more than a passing nod to the considerations that prompted this Court, in *North Carolina* v. *Pearce*, 395 U. S. 711 (1969), to safeguard due process rights by establishing a prophylactic rule of presumptive vindictiveness, the majority first refuses to apply that rule in a case where those considerations are clearly relevant, and then proceeds to rob that rule of any vitality even in cases in which it will be applied. Because I believe that under the rationale of *Pearce* we must presume vindictiveness here and that the findings of the trial judge with respect to respondent's second sentence should not be permitted to defeat that presumption, I must dissent.

I

After the jury in Sanford James McCullough's first trial imposed a sentence of 20 years' imprisonment, the Randall County Criminal District Attorney thought McCullough had been treated much too leniently. A local newspaper quoted the prosecutor as commenting: "A guy's life ought to be worth more than that." Amarillo Globe-Times, Sept. 24, 1980, p. 25, col. 1; Record, Defendant's Exhibit 5. Luckily for the District Attorney, McCullough was not satisfied with the results of his first trial either. McCullough filed a motion with the trial court requesting a new trial and raising two challenges to Judge Harney's conduct of the first trial:

> "I.
>
> "The Trial Court erred in not granting Defendant's Motion for Mistrial subsequent to the prosecutor's improper jury argument concerning the fact that the jury, if they only gave the Defendant ten to fifteen years in the penitentiary, would look outside their window at the end of that period of time and wonder if the criminal out there was the Defendant.
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> "II.
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> "The Trial Court erred in overruling Defendant's Motion for Mistrial subsequent to the prosecutor's cross-examination of the witness, DENNIS McCULLOUGH, as to a purported 'confession' given by a Co-Defendant, KENNETH McCULLOUGH. Such conduct constituted error in light of *Bruton vs. United States* [, 391 U. S. 123 (1968)]." Defendant's Motion for a New Trial, App. 17.

When Judge Harney entertained this motion on October 6, 1980, there was no argument to be heard. The Assistant District Attorney noted the State's full agreement to a retrial. Statement of Facts, vol. II, pp. 432–433. The next day's newspaper made the prosecutor's motives clear.

> "In a rare occurrence, the Randall County Criminal District Attorney Randy Sherrod said yesterday he has joined a defense motion calling for a new trial in the case of Sanford James McCullough, who was found guilty Sept. 24 of the murder of George Preston Small and sentenced to 20 years in the penitentiary.
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> "Sherrod said it was the first time in his experience that he had been in agreement with a defense attorney in granting a new trial.
>
> "He said one of the biggest factors influencing his decision to join the defense motion was the possibility of a

> [sic] getting a harsher sentence in a new trial." Amarillo Daily News, Oct. 7, 1980, p. C-1, col. 1; Record, Defendant's Exhibit 2. See also Amarillo Globe-Times, Oct. 7, 1980, p. 21, cols. 1-6 ("DA Agrees to New Trial for Man Convicted in Murder Case"). Record, Defendant's Exhibit 1.

In the face of this publicity, the defense moved for a change of venue, but its motion was denied. 2 Tr. 518 (Nov. 7, 1980). Having failed in this attempt to ensure that McCullough's second jury had no knowledge of his conviction and sentence in the first trial, the defense postponed its election of sentencer until it could hear the results of *voir dire*. 3 Tr. 7-8 (Dec. 10-12, 1980). During *voir dire* at least 13 prospective jurors were excused after indicating that their knowlege of the first trial's results would affect their ability to give McCullough a fair trial. *Id.*, at 17-33. Immediately after the close of *voir dire*, the defendant elected to be sentenced by the trial judge if convicted. *Id.*, at 122; App. 25-26. McCullough's election likely was affected by his counsel's belief that while *Chaffin* v. *Stynchcombe*, 412 U. S. 17 (1973), had made the rule of *North Carolina* v. *Pearce*, *supra*, inapplicable to resentencing by a different jury, that rule would still bar Judge Harney from imposing a sentence greater than the 20 years defendant had recieved in his first trial. But fears that *voir dire* had not been sufficient to purge the jury of all knowlege of McCullough's first trial could well have played as great a part in that decision.

After McCullough was convicted a second time, Judge Harney heard argument on sentencing. Defense counsel urged that "there being no additional evidence on the part of the conduct or action of the Defendant subsequent to the prior conviction," the court was bound by *North Carolina* v. *Pearce*, *supra*, to impose a sentence of not more than 20 years. 2 Tr. 273-274 (Dec. 10-12, 1980). The prosecution replied that because defendant had elected to be sentenced by the trial judge, *North Carolina* v. *Pearce*, would not bar the court "from assessing a range of punishment greater than what was received by a jury." 2 Tr. 277 (Dec. 10–12, 1980). Judge Harney sentenced McCullough to 50 years' imprisonment. In response to defendant's motion, she later filed an order in which, while holding the rule of *North Carolina* v. *Pearce* inapplicable, she gave her reasons for imposing a heavier sentence in order to make remand unnecessary should the Court of Criminal Appeals hold the rule applicable. App. 33. She found that the testimony of two new witnesses, Carolyn Sue Hollison McCullough and Willie Brown, implicated defendant in the crime, added to the credibility of certain prosecution witnesses, and detracted from that of certain defense witnesses. The testimony also "shed new light upon the defendant's life, conduct, and his mental and moral propensities," especially his "propensity to commit brutal crimes against persons and to constitute a future threat to society." *Id.*, at 34. Judge Harney noted further that had defendant "elected to have the court set his punishment at the first trial, the court would have assessed more than the twenty (20) year sentence imposed by the jury." *Ibid.* Finally, the court found:

> "Upon retrial after having been found guilty of murder for a second time by a jury and after having made known to the court that he had been involved in numerous criminal offenses and had served time in the penitentiary, the defendant never produced, or even attempted to produce, any evidence that he intended to change his life style, habits, or conduct, or that he had made any effort whatsoever toward rehabilitating himself. Again upon retrial, the [sic] failed to show this court any sign or indication of refraining from criminal conduct in the future, nor did he give any indication upon retrial that he no longer posed a violent and continuing threat to our society." *Id.*, at 35.

II

A

At the outset, one must reject the majority's suggestion, *ante* at ——, that the fact that McCullough elected to be sentenced by Judge Harney has any relevance to the question whether *Pearce* requires us to presume that the increase in his sentence was the product of the judge's vindictiveness. The message of *Pearce* is not that a defendant should be given a chance to choose the sentencing agency least likely to increase his sentence as a price for his decision to pursue an appeal. Rather, *Pearce* held that under the Due Process Clause, "vindictiveness against a defendant for having successfully attacked his first conviction must play no part in the sentence he receives after a new trial." 395 U. S., at 725. Thus, in *Chaffin* v. *Stynchcombe*, *supra*, where the defendant had been tried and sentenced by a jury at his first trial, the Court assumed that if the defendant had elected to be tried and sentenced by a judge at his retrial, *Pearce* would circumscribe the sentence the judge could impose should defendant be convicted again. See 412 U. S., at 33, n. 21.

Had McCullough's first conviction been overturned on appeal, rather than nullified by Judge Harney's order for a retrial, it would make no sense to allow McCullough's decision to be sentenced by the court to deprive him of the safeguards against judicial vindictiveness established in *Pearce*. Whether or not that judge had been the sentencing authority in the first proceeding, we would fear that the judge would have had a "personal stake in the prior conviction" and a "motivation to engage in self-vindication," as well as a wish to "discourag[e] what [s]he regards as meritless appeals." *Chaffin*, *supra*, at 27. Moreover, it would not be appropriate to find a waiver of McCullough's due process right in his exercise of his statutory right to elect his sentencer, especially in a case where defendant's choice might have been influenced by a desire to avoid being sentenced by a jury from a community that had been exposed to the considerable publicity surrounding his first trial.

B

In *Pearce*, recognition of the possibility that personal animosity and institutional prejudices might infect a trial judge's resentencing of a defendant after a successful appeal led this Court to establish a rule of presumptive vindictiveness. The question here is whether these same personal and institutional prejudices may infect a judge's sentencing following a retrial that the judge herself ordered.

The majority reasons that "[i]n contrast to *Pearce*, McCullough's second trial came about because the trial judge herself concluded that the prosecutor's misconduct required it. Granting McCullough's motion for a new trial hardly suggests any vindictiveness on the part of the judge towards him." *Ante*, at ——. Such an observation betrays not only an insensitivity to the motives that might underlie any trial judge's decision to grant a motion for a new trial, but also a blindness to the peculiar circumstances surrounding the decision to grant a retrial in this case.

The mere grant of a new trial motion can in no way be considered a guarantee, or even an indication, that the judge will harbor no resentment toward defendant as a result of his decision to exercise his statutory right to make such a motion. Even where a trial judge believes that the assignments of error are valid, she may still resent being given a choice between publicly conceding such errors and waiting for her judgment to be put to the test on appeal. This will be especially true when the errors alleged, however substantial as a matter of constitutional or statutory law, are considered by the judge not to cast doubt on the defendant's guilt. In such a case, the judge might well come to defendant's sentencing annoyed at having been forced to sit through a trial whose result was a foregone conclusion, and quite ready to vent that annoyance by giving the defendant a sentence stiffer than he otherwise would have received. Even if a trial judge is confident that her conduct of a trial was error-free, she may still grant a new trial if she has any doubts as to whether the courts reviewing her ruling will agree. In this situation, the feelings of resentment already alluded to might be augmented by the judge's annoyance with the courts that review her judgments.

Turning to the facts here, I believe the possibility of vindictiveness is even greater in this case than in the general run of cases in which a trial judge has granted a retrial. It is far from clear that Judge Harney's decision to grant a new trial was made out of either solicitude for McCullough or recognition of the merits of his claims. Defendant's motion was uncontested and, if the press coverage is any indication, the judge's decision to grant it was at least as much a boon to the prosecution as it was to defendant. Indeed, the most cynical might even harbor suspicions that the judge shared the District Attorney's hope that a retrial would permit the imposition of a sentence more commensurate with the prosecution's view of the heinousness of the crime for which McCullough had been brought to bar. At any rate, one can imagine that when it fell to Judge Harney to sentence McCullough after his second conviction, his decision to seek a retrial after receiving such a comparatively light sentence from his first jury was counted against him.

Whether any of these considerations actually played any part in Judge Harney's decision to give McCullough a harsher sentence after his retrial is not the issue here, just as it was not the issue in *Pearce*. The point is that the possibility they did play such a part is sufficiently real, and proving actual prejudice, sufficiently difficult, that a presumption of vindictiveness is as appropriate here as it was in *Pearce*. See Van Alstyne, In Gideon's Wake: Harsher Penalties and the "Successful" Criminal Appellant, 74 Yale L. J. 606, 612, and n. 22 (1965) (noting difficulties faced by defendant seeking to show actual vindictiveness).

III

The majority holds that "[e]ven if the *Pearce* presumption were to apply here, we believe that the findings of the trial judge overcome that presumption." *Ante*, at ——. I find the reasons offered by Judge Harney far from adequate to rebut any presumption of vindictiveness. Moreover, I believe that by holding those reasons sufficient, the Court effectively eviscerates the effort made in *Pearce* to ensure both that vindictiveness against a defendant for having successfully attacked his first conviction "play no part in the sentence he receives after a new trial," 395 U. S., at 725, and that the "defendant be freed of apprehension of such a retaliatory motivation on the part of the sentencing judge." *Ibid.*

A

The presumption of vindictiveness established in *Pearce* was made rebuttable. The Court there held that where a judge decides to impose a more severe sentence on a defendant after a new trial,

> "the reasons for his doing so must affirmatively appear. Those reasons must be based upon objective information concerning identifiable conduct on the part of the defendant occurring after the time of the original sentencing proceeding. And the factual data upon which the increased sentence is based must be made part of the record, so that the consitutional legitimacy of the increased sentence may be fully reviewed on appeal." *Id.*, at 726.

Whether this formulation allowed a sentencing judge to rely on any event occurring after a defendant's first sentencing or only on actual "conduct" by the defendant since that time might have been open to some speculation, at least until *Wasman* v. *United States*, 468 U. S. —— (1984) resolved that "mattter of semantics," *id.*, at ——, (POWELL, J., concurring in part and concurring in judgment). But the Court was quite clear that the conduct or event used to justify an increased sentence must have taken place after the original sentencing proceeding. Indeed, the majority's insistence upon this restriction led to the refusal of JUSTICE WHITE to subscribe to one part of the Court's opinion. He wrote:

> "I join the Court's opinion except that in my view Part II–C should authorize an increased sentence on retrial based on any objective, identifiable factual data not known to the trial judge at the time of the original sentencing proceeding." *Pearce*, 395 U. S., at 751 (WHITE, J., concurring in part).

The Court's rejection of the standard proposed by JUSTICE WHITE is no doubt explained by the majority's desire to "protect against reasonable apprehension of vindictiveness that could deter a defendant from appealing a first conviction." *Wasman*, 468 U. S., at —— (POWELL, J., concurring in part and concurring in judgment). As a majority of the Court recently recognized, the need to eliminate this apprehension was as much a concern of the Court in *Pearce* as actual vindictiveness. See 468 U. S., at ——; *id.*, at —— (BRENNAN, J., concurring in judgment); *id.*, at —— (STEVENS, J., concurring in judgment). Recognizing that in the course of any retrial, or merely by virtue of the passage of time, new information relating to events prior to a defendant's original sentencing would become available to a sentencer after retrial, the Court decided that allowing this information to justify a harsher sentence would make the intended guarantee of fairness sound quite hollow to the defendant deciding whether to pursue his statutory right of appeal.

B

By finding the reasons given by Judge Harney adequate to rebut a presumption of vindictiveness, the majority not only disregards the clear rule in *Pearce*. It announces a new regime in which the "chill" that plagued defendants in the days before *Pearce* will once again be felt by those deciding whether to contest their convictions.

I do not doubt Judge Harney's assertions that the testimony of Carolyn Sue Hollison McCullough and Willie Lee Brown strengthened the prosecution's case against McCullough by corroborating evidence and testimony that had already been produced at his first trial and by adding a few brush strokes to the portrayal in the first proceeding of McCullough's role in the crime and of his character. However, "[i]n the natural course of events upon the retrial of a case, one might normally expect the Government to have available additional testimony and evidence of a defendant's guilt if for no other reason than that the Government has had additional time to prepare and refine its presentation." *United States* v. *Tucker*, 581 F. 2d 602, 606, n. 8 (CA7 1978). That such new evidence will be available to a trial judge sentencing a defendant after a retrial is thus inevitable. And if that judge wishes to punish defendant for having asserted his right to a fair trial, she will always be able to point to that new information as the basis for any increase in defendant's sentence the second time around. As one authority has noted: "If a court on retrial could justify an increased sentence on the ground that it now had additional knowlege concerning the defendant's participation in the offense, then the *Pearce* limitation could be evaded in almost every case." 3 W. LaFave & J. Israel, Criminal Procedure 176 (1984). This limitation would be even more easily avoided if a trial judge could rebut a presumption of vindictiveness merely by indicating that she would have given defendant a harsher sentence at his first trial had she been given the chance. That leaves, as the only "new" information to support 30 additional years' imprisonment, the fact that between his two trials, McCullough did not evince a desire to rehabilitate himself. Surely something more is required.

There is neither any reason nor any need for us to believe that dishonest and unconstitutionally vindictive judges actually hold sway in American courtrooms, and even less call for us to doubt the integrity of Judge Harney. The message of

Pearce is that the fear of such vindictiveness is real enough. And a defendant plagued by such an apprehension is likely to take small comfort in any presumption of vindictiveness established for his benefit if the means of rebutting that presumption will always be within the easy reach of the judge who will sentence him should the challenge to his conviction prove unsuccessful. As far as defendants are concerned, today's decision, by permitting references to new, often cumulative, information about the crime charged to satisfy *Pearce*'s demand for "objective information concerning identifiable conduct on the part of the defendant," 395 U. S., at 726, nullifies the guarantee held out in *Pearce*.

Persuaded by the Solicitor General's hypothetical involving a defendant whose prior convictions are not apparent to the trial judge until after defendant's appeal and retrial, the majority concludes that "[r]estricting justifications for a sentence increase to *only* "events that occurred subsequent to the original sentencing proceedings" could in some circumstances lead to absurd results." *Ante*, at ——. However, this objection to such a restriction was considered in *Pearce* and rejected there, as it should be here. As one *amicus curiae* brief advised the *Pearce* Court:

> "In the unlikely event that some prior offense escaped the notice of the court when the accused was under consideration for sentencing, moreover, the government is free to bring a separate proceeding under its habitual offender (recidivism) acts. To the little extent that states may be concerned that sentences generally tend to be imposed in some instances without due consideration of the nature of the offense or the character of the accused, moreover, each state is constitutionally free to make ample provision for staffing and presentence reports to guard against unduly lenient sentencing to whatever extent that government feels to be appropriate. Indeed, each state presumably has done this to the precise extent that it has been genuinely concerned with the secur-

ing of sentences which are both fair to the accused and adequate for the public safety." Brief for American Civil Liberties Union et al. as *Amici Curiae* in *North Carolina* v. *Pearce*, O. T. 1968, No. 413, pp. 9-10.

IV

A lot has happened since the final day of the October 1968 Term, the day *North Carolina* v. *Pearce* was handed down. But nothing has happened since then that casts any doubt on the need for the guarantee of fairness that this Court held out to defendants in *Pearce*. The majority today begins by denying respondent the promise of that guarantee even though his case clearly calls for its application. The Court then reaches out to render the guarantee of little value to all defendants, even to those whose plight was the explict concern of the *Pearce* Court in 1969. To renege on the guarantee of *Pearce* is wrong. To do so while pretending not to is a shame. I dissent.

JU6.8/b:985/84-1321

COMPLETED

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(Slip Opinion)

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Lumber Co.*, 200 U. S. 321, 337.

ORIGINAL

SUPREME COURT OF THE UNITED STATES

JES 372

Syllabus

NIX, WARDEN *v.* WHITESIDE

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 84–1321. Argued November 5, 1985—Decided February 26, 1986

In preparing for his Iowa state-court trial on a murder charge, respondent consistently told his attorney that although he had not actually seen a gun in the victim's hand when he stabbed the victim, he was convinced that the victim had a gun. Respondent's companions who were present during the stabbing told counsel that they had not seen a gun, and no gun was found. Counsel advised respondent that the existence of a gun was not necessary to establish a claim of self-defense, and that only a reasonable belief that the victim had a gun nearby was necessary even though no gun was actually present. However, during preparation for direct examination shortly before trial, respondent for the first time told counsel that he had seen "something metallic" in the victim's hand. When asked about this, respondent said: "If I don't say I saw a gun I'm dead." On respondent's insisting that he would testify that he saw "something metallic," counsel told him that if he testified falsely, it would be counsel's duty to advise the court that he felt respondent was committing perjury, and that counsel probably would be allowed to impeach that testimony and would seek to withdraw from representation if respondent insisted on committing perjury. Respondent ultimately testified as originally contemplated, admitting on cross-examination that he had not actually seen a gun in the victim's hand. After the jury found respondent guilty, respondent moved for a new trial, claiming that he had been deprived of a fair trial by counsel's admonitions not to state that he saw a gun or "something metallic." The court denied the motion after a hearing, and the Iowa Supreme Court affirmed the conviction, holding that counsel's actions were not only permissible, but were required under Iowa law. Respondent then sought federal habeas corpus relief, alleging that he had been denied effective assistance of counsel by his attorney's refusal to allow him to testify as he proposed. The District Court

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denied relief, but the Court of Appeals reversed, concluding that an intent to commit perjury, communicated to counsel, does not alter a defendant's right to effective assistance of counsel, and that counsel's threatened violation of his client's confidences violated the "effective representation" standards set forth in *Strickland* v. *Washington*, 466 U. S. 668.

Held: The Sixth Amendment right of a criminal defendant to assistance of counsel is not violated when an attorney refuses to cooperate with the defendant in presenting perjured testimony at his trial. Pp. 5–18.

(a) *Strickland* v. *Washington*, *supra*, held that to obtain relief by way of federal habeas corpus on a claim of a deprivation of effective assistance of counsel under the Sixth Amendment, the movant must establish both serious attorney error and prejudice. The Sixth Amendment inquiry is into whether the attorney's conduct was "reasonably effective." A court must be careful not to narrow the wide range of attorney conduct acceptable under the Sixth Amendment so restrictively as to constitutionalize particular standards of professional conduct and thereby intrude into a state's proper authority to define and apply the standards of professional conduct applicable to those it admits to practice in its courts. Pp. 6–8.

(b) Counsel's conduct here fell within the wide range of professional responses to threatened client perjury acceptable under the Sixth Amendment. Counsel's duty of loyalty to, and advocacy of, the defendant's cause is limited to legitimate, lawful conduct compatible with the very nature of a trial as a search for truth. Although counsel must take all reasonable lawful means to attain his client's objectives, counsel is precluded from taking steps or in any way assisting the client in presenting false evidence or otherwise violating the law. Moreover, accepted norms require that a lawyer disclose his client's perjury and frauds upon the court. Iowa's Code also expressly permits withdrawal from representation as an appropriate response of an attorney when the client threatens to commit perjury. Pp. 8–12.

(c) The Court of Appeals' holding is not supported by the record since counsel's action, at most, deprived respondent of his contemplated perjury. Whatever the scope of a constitutional right to testify, it is elementary that such a right does not extend to testifying falsely, and the right to counsel includes no right to have a lawyer who will cooperate with planned perjury. There was no breach of professional duty in counsel's admonition to respondent that he would disclose respondent's perjury to the court. Pp. 12–17.

(d) As a matter of law, counsel's conduct here cannot establish the prejudice required for relief under the *Strickland* inquiry. The "conflict of interests" involved was one imposed on the attorney by the client's

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proposal to commit the crime of fabricating testimony. This is not the kind of conflict of interest that would render the representation constitutionally infirm. Pp. 17–18.

744 F. 2d 1323, reversed.

BURGER, C. J., delivered the opinion of the Court, in which WHITE, POWELL, REHNQUIST, and O'CONNOR, JJ., joined. BRENNAN, J., filed an opinion concurring in the judgment. BLACKMUN, J., filed an opinion concurring in the judgment, in which BRENNAN, MARSHALL, and STEVENS, JJ., joined. STEVENS, J., filed an opinion concurring in the judgment.

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D. C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

No. 84-1321

CRISPUS NIX, WARDEN, PETITIONER *v.* EMANUEL CHARLES WHITESIDE

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

[February 26, 1986]

CHIEF JUSTICE BURGER delivered the opinion of the Court.

We granted certiorari to decide whether the Sixth Amendment right of a criminal defendant to assistance of counsel is violated when an attorney refuses to cooperate with the defendant in presenting perjured testimony at his trial.[1]

I

A

Whiteside was convicted of second degree murder by a jury verdict which was affirmed by the Iowa courts. The killing took place on February 8, 1977 in Cedar Rapids, Iowa. Whiteside and two others went to one Calvin Love's apartment late that night, seeking marihuana. Love was in bed when Whiteside and his companions arrived; an argument between Whiteside and Love over the marihuana ensued. At one point, Love directed his girlfriend to get his "piece," and at another point got up, then returned to his bed. According to Whiteside's testimony, Love then started to reach under his pillow and moved toward Whiteside. Whiteside stabbed Love in the chest, inflicting a fatal wound.

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[1] Although courts universally condemn an attorney's assisting in presenting perjury, Courts of Appeals have taken varying approaches on how to deal with a client's insistence on presenting perjured testimony. The Seventh Circuit, for example, has held that an attorney's refusal to call the defendant as a witness did not render the conviction constitutionally infirm where the refusal to call the defendant was based on the attorney's belief that the defendant would commit perjury. *United States* v. *Curtis*, 742 F. 2d 1070 (CA7 1984). The Third Circuit found a violation of the Sixth Amendment where the attorney could not state any basis for her belief that defendant's proposed alibi testimony was perjured. *United States ex rel. Wilcox* v. *Johnson*, 555 F. 2d 115 (CA3 1977). See also *Lowery* v. *Cardwell*, 575 F. 2d 727 (CA9 1978) (withdrawal request in the middle of a bench trial, immediately following defendant's testimony).

Whiteside was charged with murder, and when counsel was appointed he objected to the lawyer initially appointed, claiming that he felt uncomfortable with a lawyer who had formerly been a prosecutor. Gary L. Robinson was then appointed and immediately began investigation. Whiteside gave him a statement that he had stabbed Love as the latter "was pulling a pistol from underneath the pillow on the bed." Upon questioning by Robinson, however, Whiteside indicated that he had not actually seen a gun, but that he was convinced that Love had a gun. No pistol was found on the premises; shortly after the police search following the stabbing, which had revealed no weapon, the victim's family had removed all of the victim's possessions from the apartment. Robinson interviewed Whiteside's companions who were present during the stabbing and none had seen a gun during the incident. Robinson advised Whiteside that the existence of a gun was not necessary to establish the claim of self defense, and that only a reasonable belief that the victim had a gun nearby was necessary even though no gun was actually present.

Until shortly before trial, Whiteside consistently stated to Robinson that he had not actually seen a gun, but that he was convinced that Love had a gun in his hand. About a week before trial, during preparation for direct examination, Whiteside for the first time told Robinson and his associate Donna Paulsen that he had seen something "metallic" in

Love's hand. When asked about this, Whiteside responded that

> "in Howard Cook's case there was a gun. If I don't say I saw a gun I'm dead."

Robinson told Whiteside that such testimony would be perjury and repeated that it was not necessary to prove that a gun was available but only that Whiteside reasonably believed that he was in danger. On Whiteside's insisting that he would testify that he saw "something metallic" Robinson told him, according to Robinson's testimony,

> "we could not allow him to [testify falsely] because that would be perjury, and as officers of the court we would be suborning perjury if we allowed him to do it; . . . I advised him that if he did do that it would be my duty to advise the Court of what he was doing and that I felt he was committing perjury; also, that I probably would be allowed to attempt to impeach that particular testimony." App. to Pet. for Cert. A-85.

Robinson also indicated he would seek to withdraw from the representation if Whiteside insisted on committing perjury.[2]

Whiteside testified in his own defense at trial and stated that he "knew" that Love had a gun and that he believed Love was reaching for a gun and he had acted swiftly in self defense. On cross examination, he admitted that he had not actually seen a gun in Love's hand. Robinson presented evidence that Love had been seen with a sawed-off shotgun on other occasions, that the police search of the apartment may have been careless, and that the victim's family had removed everything from the apartment shortly after the crime. Robinson presented this evidence to show a basis for Whiteside's asserted fear that Love had a gun.

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[2] Whiteside's version of the events at this pretrial meeting is considerably more cryptic:

"Q. And as you went over the questions, did the two of you come into conflict with regard to whether or not there was a weapon?

"A. I couldn't—I couldn't say a conflict. But I got the impression at one time that maybe if I didn't go along with—with what was happening, that it was no gun being involved, maybe that he will pull out of my trial." App. to Pet. for Cert. A-70.

The jury returned a verdict of second-degree murder and Whiteside moved for a new trial, claiming that he had been deprived of a fair trial by Robinson's admonitions not to state that he saw a gun or "something metallic." The trial court held a hearing, heard testimony by Whiteside and Robinson, and denied the motion. The trial court made specific findings that the facts were as related by Robinson.

The Supreme Court of Iowa affirmed respondent's conviction. *State* v. *Whiteside*, 272 N. W. 2d 468 (1978). That court held that the right to have counsel present all appropriate defenses does not extend to using perjury, and that an attorney's duty to a client does not extend to assisting a client in committing perjury. Relying on DR 7–102(A)(4) of the Iowa Code of Professional Responsibility for Lawyers, which expressly prohibits an attorney from using perjured testimony, and Iowa Code § 721.2 (now Iowa Code § 720.3 (1985)), which criminalizes subornation of perjury, the Iowa court concluded that not only were Robinson's actions permissible, but were required. The court commended "both Mr. Robinson and Ms. Paulsen for the high ethical manner in which this matter was handled."

B

Whiteside then petitioned for a writ of habeas corpus in the United States District Court for the Southern District of Iowa. In that petition Whiteside alleged that he had been denied effective assistance of counsel and of his right to present a defense by Robinson's refusal to allow him to testify as he had proposed. The District Court denied the writ. Accepting the State trial court's factual finding that Whiteside's intended testimony would have been perjurious, it concluded that there could be no grounds for habeas relief since there is no constitutional right to present a perjured defense.

The United States Court of Appeals for the Eighth Circuit reversed and directed that the writ of habeas corpus be granted. *Whiteside* v. *Scurr*, 744 F. 2d 1323 (CA8 1984). The Court of Appeals accepted the findings of the trial judge, affirmed by the Iowa Supreme Court, that trial counsel believed with good cause that Whiteside would testify falsely and acknowledged that under *Harris* v. *New York*, 401 U. S. 222 (1971), a criminal defendant's privilege to testify in his own behalf does not include a right to commit perjury. Nevertheless, the court reasoned that an intent to commit perjury, communicated to counsel, does not alter a defendant's right to effective assistance of counsel and that Robinson's admonition to Whiteside that he would inform the court of Whiteside's perjury constituted a threat to violate the attorney's duty to preserve client confidences.[3] According to the Court of Appeals, this threatened violation of client confidences breached the standards of effective representation set down in *Strickland* v. *Washington*, 466 U. S. 668 (1984). The court also concluded that *Strickland*'s prejudice requirement was satisfied by an implication of prejudice from the conflict between Robinson's duty of loyalty to his client and his ethical duties. A petition for rehearing en banc was denied, with Judges Gibson, Ross, Fagg, and Bowman dissenting. We granted certiorari, 471 U. S. —— (1985), and we reverse.

II

A

The right of an accused to testify in his defense is of relatively recent origin. Until the latter part of the preceding century, criminal defendants in this country, as at common law, were considered to be disqualified from giving sworn testimony at their own trial by reason of their interest as a party to the case. See, *e. g.*, *Ferguson* v. *Georgia*, 365 U. S. 570 (1961); R. Morris, Studies in the History of American Law 59–60 (2d ed. 1959). Iowa was among the states that adhered to this rule of disqualification. *State* v. *Laffer*, 38 Iowa 422 (1874).

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[3] The Court of Appeals agreed with the District Court's finding that respondent properly exhausted his claims in state court. Although respondent had pressed his claim before the Supreme Court of Iowa as a denial of his due process right to a fair trial, and not as a denial of his Sixth Amendment right to counsel, the Court of Appeals accepted the District Court's

By the end of the nineteenth century, however, the disqualification was finally abolished by statute in most states and in the federal courts. Act of Mar. 16, 1878, ch. 37, 20 Stat. 30–31; see Thayer, A Chapter of Legal History in Massachusetts, 9 Harv. L. Rev. 1, 12 (1895). Although this Court has never explicitly held that a criminal defendant has a due process right to testify in his own behalf, cases in several Circuits have so held and the right has long been assumed. See, *e. g.*, *United States* v. *Curtis*, 742 F. 2d. 1070, 1076 (CA7 1984); *United States* v. *Bifield*, 702 F. 2d 342, 349 (CA2), cert. denied 461 U. S. 931 (1983). We have also suggested that such a right exists as a corollary to the Fifth Amendment privilege against compelled testimony, see *Harris* v. *New York*, *supra*, at 225. See also *Ferguson*, 365 U. S., at 598–601 (concurring opinion of Justice Frankfurter); *id.*, at 601–603 (concurring opinion of Justice Clark).

B

In *Strickland* v. *Washington*, we held that to obtain relief by way of federal habeas corpus on a claim of a deprivation of effective assistance of counsel under the Sixth Amendment, the movant must establish both serious attorney error and prejudice. To show such error, it must be established that the assistance rendered by counsel was constitutionally deficient in that "counsel made errors so serious that counsel was not functioning as 'counsel' guaranteed the defendant by the

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conclusion that the Sixth Amendment claim was exhausted, since further proceedings would be futile.

Sixth Amendment." *Strickland,* 466 U. S., at 687. To show prejudice, it must be established that the claimed lapses in counsel's performance rendered the trial unfair so as to "undermine confidence in the outcome" of the trial. *Id.*, at 694.

In *Strickland,* we acknowledged that the Sixth Amendment does not require any particular response by counsel to a problem that may arise. Rather, the Sixth Amendment inquiry is into whether the attorney's conduct was "reasonably effective." To counteract the natural tendency to fault an unsuccessful defense, a court reviewing a claim of ineffective assistance must "indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Id.*, at 689. In giving shape to the perimeters of this range of reasonable professional assistance, *Strickland* mandates that

> "Prevailing norms of practice as reflected in American Bar Association Standards and the like, . . . are guides to determining what is reasonable, but they are only guides." *Id.*, at 688.

Under the *Strickland* standard, breach of an ethical standard does not necessarily make out a denial of the Sixth Amendment guarantee of assistance of counsel. When examining attorney conduct, a court must be careful not to narrow the wide range of conduct acceptable under the Sixth Amendment so restrictively as to constitutionalize particular standards of professional conduct and thereby intrude into the State's proper authority to define and apply the standards of professional conduct applicable to those it admits to practice in its courts. In some future case challenging attorney conduct in the course of a state court trial, we may need to define with greater precision the weight to be given to recognized canons of ethics, the standards established by the State in statutes or professional codes, and the Sixth Amendment, in defining the proper scope and limits on that conduct.

Here we need not face that question, since virtually all of the sources speak with one voice.

C

We turn next to the question presented: the definition of the range of "reasonable professional" responses to a criminal defendant client who informs counsel that he will perjure himself on the stand. We must determine whether, in this setting, Robinson's conduct fell within the wide range of professional responses to threatened client perjury acceptable under the Sixth Amendment.

In *Strickland*, we recognized counsel's duty of loyalty and his "overarching duty to advocate the defendant's cause," *Ibid.* Plainly, that duty is limited to legitimate, lawful conduct compatible with the very nature of a trial as a search for truth. Although counsel must take all reasonable lawful means to attain the objectives of the client, counsel is precluded from taking steps or in any way assisting the client in presenting false evidence or otherwise violating the law. This principle has consistently been recognized in most unequivocal terms by expositors of the norms of professional conduct since the first Canons of Professional Ethics were adopted by the American Bar Association in 1908. The 1908 Canon 32 provided that

> "No client, corporate or individual, however powerful, nor any cause, civil or political, however important, is entitled to receive nor should any lawyer render any service or advice involving disloyalty to the law whose ministers we are, or disrespect of the judicial office, which we are bound to uphold, or corruption of any person or persons exercising a public office or private trust, or deception or betrayal of the public. . . . He must . . . observe and advise his client to observe the statute law . . . ." Canons of Professional Ethics, Canon 32.

Of course, this Canon did no more than articulate centuries of accepted standards of conduct. Similarly, Canon 37, adopted in 1928, explicitly acknowledges as an exception to the attorney's duty of confidentiality a client's announced attention to commit a crime:

> "The announced intention of a client to commit a crime is not included within the confidences which [the attorney] is bound to respect."

These principles have been carried through to contemporary codifications[4] of an attorney's professional responsibility. Disciplinary Rule 7–102 of the Model Code of Professional Responsibility (1980), entitled "Representing a Client Within the Bounds of the Law," provides that

> "(A) In his representation of a client, a lawyer shall not:
>
> . . . . .
>
> "(4) Knowingly use perjured testimony or false evidence.
>
> . . . . .
>
> "(7) Counsel or assist his client in conduct that the lawyer knows to be illegal or fraudulent."

This provision has been adopted by Iowa, and is binding on all lawyers who appear in its courts. See Iowa Code of Professional Responsibility for Lawyers (1985). The more recent Model Rules of Professional Conduct (1983) similarly admonish attorneys to obey all laws in the course of representing a client:

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[4] There currently exist two different codifications of uniform standards of professional conduct. The Model Code of Professional Responsibility was originally adopted by the American Bar Association in 1969, and was subsequently adopted (in may cases with modification) by nearly every state. The more recent Model Rules of Professional Conduct were adopted by the American Bar Association in 1983. Since their promulgation by the American Bar Association, the Model Rules have been adopted by 11 States: Arizona, Arkansas, Delaware, Minnesota, Missouri, Montana, Nevada, New Hampshire, New Jersey, North Carolina, and Washington. See 1 ABA/BNA Lawyers' Manual on Professional Conduct 334 (1984–1985) (New Jersey); *id.*, at 445 (Arizona); *id.*, at 855 (Montana, Minnesota); *id.*, at 924 (Missouri); *id.*, at 961 (Delaware, Washington); *id.*, at 1026 (North Carolina); *id.*, at 1127 (Arkansas); 2 *id.*, at 14 (1986) (New Hampshire, Nevada). Iowa is one of the States that adopted a form of the Model Code of Professional Responsibility, but has yet to adopt the Model Rules. See Iowa Code of Professional Responsibility for Lawyers (1985).

> "*RULE 1.2* Scope of Representation
>
> . . . . .
>
> "(d) A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent . . . ."

Both the Model Code of Professional Conduct and the Model Rules of Professional Conduct also adopt the specific exception from the attorney-client privilege for disclosure of perjury that his client intends to commit or has committed. DR 4–101(C)(3) (intention of client to commit a crime); Rule 3.3 (lawyer has duty to disclose falsity of evidence even if disclosure compromises client confidences). Indeed, both the Model Code and the Model Rules do not merely *authorize* disclosure by counsel of client perjury; they *require* such disclosure. See Rule 3.3(a)(4); DR 7–102(B)(1); *Committee on Professional Ethics and Conduct of Iowa State Bar Association* v. *Crary*, 245 N. W. 2d 298 (Iowa 1976).

These standards confirm that the legal profession has accepted that an attorney's ethical duty to advance the interests of his client is limited by an equally solemn duty to comply with the law and standards of professional conduct; it specifically ensures that the client may not use false evidence.[5] This special duty of an attorney to prevent and dis-

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[5] The brief of *amicus* American Bar Association, which supports petitioners, makes this point, referring to the history of codes of professional conduct which it has promulgated. The preamble to the most current version of the ethical standards recognizes the difficult choices that may confront an attorney who is sensitive to his concurrent duties to his client and to the legal system:

"Within the framework of these Rules many difficult issues of professional discretion can arise. Such issues must be resolved through the exercise of sensitive professional and moral judgment guided by the basic principles close frauds upon the court derives from the recognition that perjury is as much a crime as tampering with witnesses or jurors by way of promises and threats, and undermines the administration of justice. See 1 W. Burdick, Law of Crime §§ 293, 300, 318–336 (1946).

The offense of perjury was a crime recognized at common law, *id.*, at p. 475, and has been made a felony in most states by statute, including Iowa. Iowa Code § 720.2 (1985). See generally, 4 C. Torcia, Wharton's Criminal Law § 631. An attorney who aids false testimony by questioning a witness when perjurious responses can be anticipated, risks prosecution for subornation of perjury under Iowa Code § 720.3 (1985).

It is universally agreed that at a minimum the attorney's first duty when confronted with a proposal for perjurious testimony is to attempt to dissuade the client from the unlawful course of conduct. Model Rules of Professional Conduct, Rule 3.3, Comment; Wolfram, Client Perjury, 50 S. Cal. L. Rev. 809, 846 (1977). A statement directly in point is found in the Commentary to the Model Rules of Professional Conduct under the heading "False Evidence":

> "When false evidence is offered by the client, however, a conflict may arise between the lawyer's duty to keep the client's revelations confidential and the duty of candor to the court. Upon ascertaining that material evidence is false, the lawyer *should seek to persuade the client that the evidence should not be offered* or, if it has been offered, that its false character should immediately be disclosed." Model Rules of Professional Conduct, Rule 3.3, Comment (1983) (emphasis added).

The Commentary thus also suggests that an attorney's revelation of his client's perjury to the court is a professionally responsible and acceptable response to the conduct of a client

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underlying the Rules." Preamble, Model Rules of Professional Conduct, p. 10 (1983).

who has actually given perjured testimony. Similarly, the Model Rules and the commentary, as well as the Code of Professional Responsibility adopted in Iowa expressly permit withdrawal from representation as an appropriate response of an attorney when the client threatens to commit perjury. Model Rules of Professional Conduct, Rule 1.16(a)(1), Rule 1.6, Comment (1983); Code of Professional Responsibility, DR 2–110(B), (C) (1980). Withdrawal of counsel when this situation arises at trial gives rise to many difficult questions including possible mistrial and claims of double jeopardy.[6]

The essence of the brief *amicus* of the American Bar Association reviewing practices long accepted by ethical lawyers, is that under no circumstance may a lawyer either advocate or passively tolerate a client's giving false testimony. This, of course, is consistent with the governance of trial conduct in what we have long called "a search for truth." The suggestion sometimes made that "a lawyer must believe his client not judge him" in no sense means a lawyer can honorably be a party to or in any way give aid to presenting known perjury.

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[6] In the evolution of the contemporary standards promulgated by the American Bar Association, an early draft reflects a compromise suggesting that when the disclosure of intended perjury is made during the course of trial, when withdrawal of counsel would raise difficult questions of a mistrial holding, counsel had the option to let the defendant take the stand but decline to affirmatively assist the presentation of perjury by traditional direct examination. Instead, counsel would stand mute while the defendant undertook to present the false version in narrative form in his own words unaided by any direct examination. This conduct was thought to be a signal at least to the presiding judge that the attorney considered the testimony to be false and was seeking to disassociate himself from that course. Additionally, counsel would not be permitted to discuss the known false testimony in closing arguments. See ABA Standards for Criminal Justice, 4–7.7 (2d ed. 1980). Most courts treating the subject rejected this approach and insisted on a more rigorous standard, see, e. g., *United States* v. *Curtis*, 742 F. 2d 1070 (CA7 1984); *McKissick* v. *United States*, 379 F. 2d 754 (CA5 1967), aff'd after remand, 398 F. 2d 342 (CA5 1968); *Dodd* v. *Florida Bar*, 118 So. 2d 17, 19 (Fla. 1960). The Eighth Circuit in this case and the Ninth Circuit have expressed approval of the "free narrative" standards. *Whiteside* v. *Scurr*, 744 F. 2d 1323, 1331 (CA8 1984); *Lowery* v. *Cardwell*, 575 F. 2d 727 (CA9 1978).

The Rule finally promulgated in the current Model Rules of Professional Conduct rejects any participation or passive role whatever by counsel in allowing perjury to be presented without challenge.

D

Considering Robinson's representation of respondent in light of these accepted norms of professional conduct, we discern no failure to adhere to reasonable professional standards that would in any sense make out a deprivation of the Sixth Amendment right to counsel. Whether Robinson's conduct is seen as a successful attempt to dissuade his client from committing the crime of perjury, or whether seen as a "threat" to withdraw from representation and disclose the illegal scheme, Robinson's representation of Whiteside falls well within accepted standards of professional conduct and the range of reasonable professional conduct acceptable under *Strickland.*

The Court of Appeals assumed for the purpose of the decision that Whiteside would have given false testimony had counsel not intervened; its opinion states,

> "[W]e presume that appellant would have testified falsely.
>
> . . . . .
>
> Counsel's actions prevented [Whiteside] from testifying falsely. We hold that counsel's action deprived appellant of due process and effective assistance of counsel.
>
> . . . . .
>
> "Counsel's actions also impermissibly compromised appellant's right to testify in his own defense by conditioning continued representation by counsel and confidentiality upon appellant's restricted testimony."
> *Whitside* v. *Scurr*, 750 F. 2d. 713, 714–15 (CA8 1984).

While purporting to follow the Iowa's highest court "on all questions of state law," 744 F. 2d., at 1330, the Court of Appeals reached its conclusions on the basis of federal constitutional due process and right to counsel.

The Court of Appeals' holding that Robinson's "action deprived [Whiteside] of due process and effective assistance of counsel" is not supported by the record since Robinson's action, at most, deprived Whiteside of his contemplated perjury. Nothing counsel did in any way undermined Whiteside's claim that he believed the victim was reaching for a gun. Similarly, the record gives no support for holding that Robinson's action "also impermissibly compromised [Whiteside's] right to testify in his own defense by conditioning continued representation . . . and confidentiality upon [Whiteside's] *restricted* testimony." The record in fact shows the contrary: (a) that Whiteside did testify, and (b) he was "restricted" or restrained only from testifying falsely and was aided by Robinson in developing the basis for the fear that Love was reaching for a gun. Robinson divulged no client communications until he was compelled to do so in response to Whiteside's post-trial challenge to the quality of his performance. We see this as a case in which the attorney successfully dissuaded the client from committing the crime of perjury.

Paradoxically, even while accepting the conclusion of the Iowa trial court that Whiteside's proposed testimony would have been a criminal act, the Court of Appeals held that Robinson's efforts to persuade Whiteside not to commit that crime were improper, *first*, as forcing an impermissible choice between the right to counsel and the right to testify; and *second*, as compromising client confidences because of Robinson's threat to disclose the contemplated perjury.[7]

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[7] The Court of Appeals also determined that Robinson's efforts to persuade Whiteside to testify truthfully constituted an impermissible threat to testify against his own client. We find no support for a threat to testify against Whiteside while he was acting as counsel. The record reflects testimony by Robinson that he had admonished Whiteside that if he withdrew he "probably would be allowed to attempt to impeach that particular testi-

Whatever the scope of a constitutional right to testify, it is elementary that such a right does not extend to testifying *falsely*. In *Harris* v. *New York*, we assumed the right of an accused to testify "in his own defense, or to refuse to do so" and went on to hold that

> "that privilege cannot be construed to include the right to commit perjury. See *United States* v. *Knox*, 396 U. S. 77 (1969); cf. *Dennis* v. *United States*, 384 U. S. 855, (1966). Having voluntarily taken the stand, petitioner was under an obligation to speak truthfully . . . ." 401 U. S., at 225.

In *Harris* we held the defendant could be impeached by prior contrary statements which had been ruled inadmissible under *Miranda* v. *Arizona*, 384 U. S. 436 (1966). *Harris* and other cases make it crystal clear that there is no right whatever—constitutional or otherwise—for a defendant to use false evidence. See also *United States* v. *Havens*, 446 U. S. 620, 626–627 (1980).

The paucity of authority on the subject of any such "right" may be explained by the fact that such a notion has never been responsibly advanced; the right to counsel includes no right to have a lawyer who will cooperate with planned perjury. A lawyer who would so cooperate would be at risk of prosecution for suborning perjury, and disciplinary proceedings, including suspension or disbarment.

Robinson's admonitions to his client can in no sense be said to have forced respondent into an *impermissible* choice between his right to counsel and his right to testify as he proposed for there was no *permissible* choice to testify falsely. For defense counsel to take steps to persuade a criminal defendant to testify truthfully, or to withdraw, deprives the defendant of neither his right to counsel nor the right to testify truthfully. In *United States* v. *Havens*, *supra*, we

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mony," if Whiteside testified falsely. The trial court accepted this version of the conversation as true.

made clear that "when defendants testify, they must testify truthfully or suffer the consequences." *Id.*, at 626. When an accused proposes to resort to perjury or to produce false evidence, one consequence is the risk of withdrawal of counsel.

On this record, the accused enjoyed continued representation within the bounds of reasonable professional conduct and did in fact exercise his right to testify; at most he was denied the right to have the assistance of counsel in the presentation of false testimony. Similarly, we can discern no breach of professional duty in Robinson's admonition to respondent that he would disclose respondent's perjury to the court. The crime of perjury in this setting is indistinguishable in substance from the crime of threatening or tampering with a witness or a juror. A defendant who informed his counsel that he was arranging to bribe or threaten witnesses or members of the jury would have no "right" to insist on counsel's assistance or silence. Counsel would not be limited to advising against that conduct. An attorney's duty of confidentiality, which totally covers the client's admission of guilt, does not extend to a client's announced plans to engage in future criminal conduct. See *United States* v. *Clark*, 289 U. S. 1, 15 (1933). In short, the responsibility of an ethical lawyer, as an officer of the court and a key component of a system of justice, dedicated to a search for truth, is essentially the same whether the client announces an intention to bribe or threaten witnesses or jurors or to commit or procure perjury. No system of justice worthy of the name can tolerate a lesser standard.

The rule adopted by the Court of Appeals, which seemingly would require an attorney to remain silent while his client committed perjury, is wholly incompatible with the established standards of ethical conduct and the laws of Iowa and contrary to professional standards promulgated by that State. The position advocated by petitioner, on the contrary, is wholly consistent with the Iowa standards of professional conduct and law, with the overwhelming majority of courts,[8] and with codes of professional ethics. Since there has been no breach of any recognized professional duty, it follows that there can be no deprivation of the right to assistance of counsel under the *Strickland* standard.

E

We hold that, as a matter of law, counsel's conduct complained of here cannot establish the prejudice required for relief under the second strand of the *Strickland* inquiry. Although a defendant need not establish that the attorney's deficient performance more likely than not altered the outcome in order to establish prejudice under *Strickland*, a defendant must show "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." 466 U. S., at 694. According to *Strickland*, "[a] reasonable probability is a probability sufficient to undermine confidence in the outcome." *Ibid.* The *Strickland* Court noted that the "benchmark" of an ineffective assistance claim is the fairness of the adversary proceeding, and that in judging prejudice and the likelihood of a different outcome, "[a] defendant has no entitlement to the luck of a lawless decisionmaker." *Id.*, at 695.

Whether he was persuaded or compelled to desist from perjury, Whiteside has no valid claim that confidence in the result of his trial has been diminished by his desisting from the contemplated perjury. Even if we were to assume that the jury might have believed his perjury, it does not follow that Whiteside was prejudiced.

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[8] See *United States* v. *Curtis*, 742 F. 2d 1070 (CA7 1984); *Committee on Professional Ethics* v. *Crary*, 245 N. W. 2d 298 (Iowa 1976); *State* v. *Robinson*, 290 N. C. 56, 224 S. E. 2d 174 (1976); *Thornton* v. *United States*, 357 A. 2d 429 (D. C. 1976); *State* v. *Henderson*, 205 Kan. 231, 468 P. 2d 136 (1970); *McKissick* v. *United States*, 379 F. 2d 754 (CA5 1967); *In re King*, 7 Utah 2d 258, 322 P. 2d 1095 (1958); *In re Carroll*, 244 S. W. 2d 474 (Ky. 1951); *Hinds* v. *State Bar*, 19 Cal. 2d 87, 119 P. 2d 134 (1941). Contra, *Whiteside* v. *Scurr*, 744 F. 2d 1323 (CA8 1984); *Lowery* v. *Cardwell*, 575 F. 2d 727 (CA9 1978).

In his attempt to evade the prejudice requirement of *Strickland*, Whiteside relies on cases involving conflicting loyalties of counsel. In *Cuyler* v. *Sullivan*, 446 U. S. 335 (1980), we held that a defendant could obtain relief without pointing to a specific prejudicial default on the part of his counsel, provided it is established that the attorney was "actively represent[ing] conflicting interests." *Id.*, at 350.

Here, there was indeed a "conflict," but of a quite different kind; it was one imposed on the attorney by the client's proposal to commit the crime of fabricating testimony without which, as he put it, "I'm dead." This is not remotely the kind of conflict of interests dealt with in *Cuyler* v. *Sullivan*. Even in that case we did not suggest that all multiple representations necessarily resulted in an active conflict rendering the representation constitutionally infirm. If a "conflict" between a client's proposal and counsel's ethical obligation gives rise to a presumption that counsel's assistance was prejudicially ineffective, every guilty criminal's conviction would be suspect if the defendant had sought to obtain an acquittal by illegal means. Can anyone doubt what practices and problems would be spawned by such a rule and what volumes of litigation it would generate?

Whiteside's attorney treated Whiteside's proposed perjury in accord with professional standards, and since Whiteside's truthful testimony could not have prejudiced the result of his trial, the Court of Appeals was in error to direct the issuance of a writ of habeas corpus and must be reversed.

Reversed.

SUPREME COURT OF THE UNITED STATES

No. 84-1321

CRISPUS NIX, WARDEN, PETITIONER *v.* EMANUEL CHARLES WHITESIDE

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

[February 26, 1986]

JUSTICE BRENNAN, concurring in the judgment.

This Court has no constitutional authority to establish rules of ethical conduct for lawyers practicing in the state courts. Nor does the Court enjoy any statutory grant of jurisdiction over legal ethics.

Accordingly, it is not surprising that the Court emphasizes that it "must be careful not to narrow the wide range of professional conduct acceptable under the Sixth Amendment so restrictively as to constitutionalize particular standards of professional conduct and thereby intrude into the State's proper authority to define and apply the standards of professional conduct applicable to those it admits to practice in its courts." *Ante*, at ——. I read this as saying in another way that the Court *cannot* tell the states or the lawyers in the states how to behave in their courts, unless and until federal rights are violated.

Unfortunately, the Court seems unable to resist the temptation of sharing with the legal community its vision of ethical conduct. But let there be no mistake: the Court's essay regarding what constitutes the correct response to a criminal client's suggestion that he will perjure himself is pure discourse without force of law. As JUSTICE BLACKMUN observes, *that* issue is a thorny one, *post*, at ——, but it is not an issue presented by this case. Lawyers, judges, bar associations, students and others should understand that the problem has not now been "decided."

I join JUSTICE BLACKMUN's concurrence because I agree that respondent has failed to prove the kind of prejudice necessary to make out a claim under *Strickland* v. *Washington*, 466 U. S. 668 (1984).

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[February 26, 1986]

JUSTICE BLACKMUN, with whom JUSTICE BRENNAN, JUSTICE MARSHALL, and JUSTICE STEVENS join, concurring in the judgment.

How a defense attorney ought to act when faced with a client who intends to commit perjury at trial has long been a controversial issue.[1] But I do not believe that a federal habeas corpus case challenging a state criminal conviction is an appropriate vehicle for attempting to resolve this thorny problem. When a defendant argues that he was denied effective assistance of counsel because his lawyer dissuaded him from committing perjury, the only question properly presented to this Court is whether the lawyer's actions deprived the defendant of the fair trial which the Sixth Amendment is meant to guarantee. Since I believe that the respondent in this case suffered no injury justifying federal habeas relief, I concur in the Court's judgment.

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[1] See, *e. g.*, Callan and David, *Professional Responsibility and the Duty of Confidentiality: Disclosure of Client Misconduct in an Adversary System*, 29 Rutgers L. Rev. 332 (1976); Rieger, *Client Perjury: A Proposed Resolution of the Constitutional and Ethical Issues*, 70 Minn. L. Rev. 121 (1985); compare, *e. g.*, Freedman, *Professional Responsibility of the Criminal Defense Lawyer: The Three Hardest Questions*, 64 Mich. L. Rev. 1469 (1966), and ABA Standards for Criminal Justice, Proposed Standard 4-7.7 (2d ed. 1980) (approved by the Standing Committing on Association Standards for Criminal Justice, but not yet submitted to the House of Delegates), with Noonan, *The Purposes of Advocacy and the Limits of Confidentiality*, 64 Mich. L. Rev. 1485 (1966), and ABA Model Rules of Professional Conduct, Rule 3.3 and comment, at 66-67 (1983).

I

On February 7, 1977, Emmanual Charles Whiteside stabbed Calvin Love to death. At trial, Whiteside claimed self-defense. On direct examination, he testified that Love's bedroom, where the stabbing had occurred, was "[v]ery much dark," App. 48, and that he had stabbed Love during an argument because he believed that Love was about to attack him with a weapon:

> "Q. Did you think that Calvin had a gun?
>
> "A. Most definitely I thought that.
>
> "Q. Why did you think that?
>
> "A. Because of Calvin's reputation, his brother's reputation, because of the prior conversation that Calvin and I had, I didn't have no other choice but to think he had a gun. And when he told his girl friend to give him his piece, I couldn't retreat." *Id.*, at 50.

Whiteside's testimony was consistent with that of other witnesses who testified that the room was dark, and that Love had asked his girlfriend to get his "piece" (which they all believed referred to a weapon). See, *e. g.*, *id.*, at 17–18, 20, 36–37, and 42–45. No gun, however, was ever found.

Whiteside, who had been charged with first-degree murder, was convicted of second-degree murder, and sentenced to 40 years' imprisonment. He moved for a new trial, contending that his court-appointed attorneys, Gary Robinson and Donna Paulsen, had improperly coerced his testimony. Whiteside now claimed that he had seen a gun, but had been prevented from testifying to this fact.

At an evidentiary hearing on this motion, Whiteside testified that he had told Robinson at their first meeting that he had seen a weapon in Love's hand. Some weeks later, Robinson informed Whiteside that the weapon could not be found and, according to Whiteside, told him to say only that he thought he had seen a gun, rather than that he in fact had seen one. Whiteside "got the impression at one time that maybe if I didn't go along with—with what was happening, that it was no gun being involved, maybe that he will pull out of my trial." App. to Pet. for Cert. A70.

Robinson's testimony contradicted Whiteside's. According to Robinson, Whiteside did not initially claim to have seen a gun, but rather claimed only that he was convinced Love had had one. Roughly a week before the trial, however, in the course of reviewing Whiteside's testimony, Whiteside "made reference to seeing something 'metallic' . . . . I don't think he ever did say a gun." *Id.*, at A85:

> "And at the end Donna asked him about that, because that was the first time it had ever been mentioned either to her or to myself. His response to that was, 'in Howard Cook's case there was a gun. If I don't say I saw a gun, I'm dead.' I explained to him at that time that it was not necessary that the gun be physically present for self-defense, one; two, that to say that would be perjury on his part because he had never at any time indicated that there was a gun . . .; three, that we could not allow him to do that . . .; four, I advised him that if he did do that it would be my duty to advise the Court of what he was doing . . .; also, that I probably would be allowed to attempt to impeach that particular testimony. I told him that there was no need for him to lie about what had happened, that he had a good and valid defense on the facts as he had related them to us, and we felt we could present a good self-defense case on the facts he had stated to us." *Ibid.*

Robinson acknowledged that Whiteside's claim of self-defense would have been stronger had the gun been found, but explained that at trial "we tried to create a gun," through testimony from people who had seen Love carrying a gun on other occasions, through a stipulation that Love had been convicted of possession of a weapon, and through suggestions made during cross-examination of the State's witnesses that the initial police search had been too cursory to discover the weapon and that Love's girlfriend had removed it from the apartment prior to a second, more thorough, search. *Id.*, at A87–A88.

The trial court rejected Whiteside's motion for a new trial, "find[ing] the facts to be as testified to by Ms. Paulsen and Mr. Robinson." App. 57. The Iowa Supreme Court affirmed. *State* v. *Whiteside*, 272 N. W. 2d 468 (1978).

Whiteside then sought federal habeas relief in the United States District Court for the Southern District of Iowa. The parties agreed to rest on the record made in the state court proceedings. Chief Judge Stuart held that the trial judge's factual finding that Whiteside would have committed perjury had he testified at trial actually to having seen a gun was fairly supported by the record and thus entitled to a presumption of correctness. See 28 U. S. C. § 2254(d). Since Whiteside had no constitutional right to perjure himself, he had been denied neither a fair trial nor effective assistance of counsel. App. to Pet. for Cert. A41.

The Court of Appeals for the Eighth Circuit reversed. *Whiteside* v. *Scurr*, 744 F. 2d 1323 (1984). The court recognized that the issue before it was not whether Robinson had behaved ethically,[2] but rather whether Whiteside had been deprived of effective assistance of counsel. *Id.*, at 1330. In the Court of Appeals' view, Robinson had breached the obligations of confidentiality and zealous advocacy imposed on defense counsel by the Sixth Amendment. In addition, the Court of Appeals concluded that Robinson's actions impermissibly compromised Whiteside's constitutional right to testify in his own behalf by conditioning continued representation and confidentiality on Whiteside's limiting his testimony.

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[2] The court stated:

"That question is governed solely by the Iowa Code of Professional Responsibility, as it was in effect at the time of the trial in this case, and as it has been authoritatively interpreted by the Supreme Court of Iowa. The Supreme Court of Iowa is the last word on all questions of state law, and the Code of Professional Responsibility is a species of state law." 744 F. 2d, at 1330.

Thus, the court declined to address the question whether Robinson's actions were either compelled or condoned by Iowa law.

The court recognized that, under *Strickland* v. *Washington*, 466 U. S. 668 (1984), a defendant must normally demonstrate both that his attorney's behavior was professionally unreasonable and that he was prejudiced by his attorney's unprofessional behavior. But it noted that *Strickland* v. *Washington* had recognized a "limited" presumption of prejudice when counsel is burdened by an actual conflict of interest that adversely affects his performance, see 466 U. S., at 692, quoting *Cuyler* v. *Sullivan*, 446 U. S. 335, 348, 350 (1980). Here, Whiteside had shown that Robinson's obligations under the Iowa Code of Professional Responsibility conflicted with his client's wishes, and his threat to testify against Whiteside had adversely affected Whiteside by "undermin[ing] the fundamental trust between lawyer and client" necessary for effective representation. 744 F. 2d, at 1330.

Petitioner's motion for rehearing en banc was denied by a vote of 5 to 4. *Whiteside* v. *Scurr*, 750 F. 2d 713 (CA8 1984). In dissent, Judge John R. Gibson, joined by Judges Ross, Fagg, and Bowman, argued that Whiteside had failed to show cognizable prejudice. *Cuyler* v. *Sullivan* was inapposite, both because finding a conflict of interest required making the untenable assumption that Whiteside possessed the right to testify falsely and because Robinson's threat had had no adverse effect on the trial since Whiteside testified fully in his defense. Moreover, the result of the proceeding should not have been different had Whiteside been permitted to testify as he wished.

A separate dissent by Judge Fagg, joined by Judges Ross, John R. Gibson, and Bowman, addressed the performance prong of *Strickland*. Robinson's admonition to Whiteside to testify truthfully simply could not be viewed as creating a conflict of interest; Robinson presented a full and zealous defense at trial; and, although Robinson's warning to Whiteside may have been "strident," 750 F. 2d, at 718, he had communicated with his client in a manner the client understood.

II

A

The District Court found that the trial judge's statement that "I find the facts to be as testified to by Ms. Paulsen and Mr. Robinson" was a factual finding that Whiteside "would have perjured himself if he had testified at trial that he actually saw a gun in his victim's hand." App. to Pet. for Cert. A42. This factual finding by the state court is entitled to a presumption of correctness under 28 U. S. C. §2254(d), which Whiteside has not overcome.

Respondent has never attempted to rebut the presumption by claiming that the factfinding procedure employed by Iowa in considering new trial motions in any sense deprived him of a full and fair hearing or failed to provide a sufficient basis for denying his motion.[3] Although respondent's argument to this Court in large part assumes that the precluded testimony would have been false, see Brief for Respondent 10–11, he contends, first, that the record does not fairly support the conclusion that he intended to perjure himself because he claimed in his first written statement that Love had been pulling a pistol from under a pillow at the time of the stabbing, see App. 55, and, second, that whether Robinson had sufficient knowledge to conclude he was going to commit perjury was a mixed question of law and fact to which the presumption of correctness does not apply.

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[3] Whiteside's motion for a new trial rested on his recantation of his testimony at trial. As a matter of Iowa law, when a trial judge is faced with a motion for a new trial based on a witness' recantation of his trial testimony, the judge must decide whether the recantation is believable:

> "The trial court is not required to believe the recantation, but must make its decision on the basis of the whole trial and the matters presented on the hearing on the motion. Premised thereon, if it believes the [post conviction] statements . . . are false, and is not reasonably well satisfied that the testimony given by the witness on the trial was false, it should deny the motion, and it is not at liberty to shift upon the shoulders of another jury the responsibility to seek out the truth of that matter." *State* v. *Compiano*, 261 Iowa 509, 517, 154 N. W. 2d 845, 849 (1967).

See also, *e. g.*, *State* v. *Taylor*, 287 N. W. 2d 576, 578 (Iowa 1980); *State* v. *McGhee*, 280 N. W. 2d 436, 442 (Iowa 1979), cert. denied, 444 U. S. 1039 (1980); cf. *United States* v. *Johnson*, 327 U. S. 106, 110–111 (1946).

Neither contention overcomes the presumption of correctness due the state court's finding. First, the trial judge's implicit decision not to credit the written statement is fairly supported by Robinson's testimony that the written statement had not been prepared by Whiteside alone and that, from the time of their initial meeting until the week before trial, Whiteside never again claimed to have seen a gun. See App. to Pet. for Cert. A78–A79. Second, the finding properly accorded a presumption of correctness by the courts below was that Whiteside's "proposed testimony would [have been] deliberately untruthful." *State* v. *Whiteside*, 272 N. W. 2d, at 471. The lower courts did not purport to presume the correctness of the Iowa Supreme Court's holding concerning the mixed question respondent identifies—whether Robinson's response to Whiteside's proposed testimony deprived Whiteside of effective representation.

B

The Court approaches this case as if the performance and prejudice standard requires us in every case to determine "the perimeters of [the] range of reasonable professional assistance," *ante*, at 7, but *Strickland* v. *Washington* explicitly contemplates a different course:

> "Although we have discussed the performance component of an ineffectiveness claim prior to the prejudice component, there is no reason for a court deciding an in-

> effective assistance claim to approach the inquiry in the same order or even to address both components of the inquiry if the defendant makes an insufficient showing on one. In particular, a court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. . . . If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed." 466 U. S., at 697.

See also *Hill* v. *Lockhart*, —— U. S. ——, —— (1985) (slip op. 8). In this case, respondent has failed to show any legally cognizable prejudice. Nor, as is discussed below, is this a case in which prejudice should be presumed.

The touchstone of a claim of prejudice is an allegation that counsel's behavior did something "to deprive the defendant of a fair trial, a trial whose result is reliable." *Strickland* v. *Washington*, 466 U. S., at 687. The only effect Robinson's threat had on Whiteside's trial is that Whiteside did not testify, falsely, that he saw a gun in Love's hand.[4] Thus, this Court must ask whether its confidence in the outcome of Whiteside's trial is in any way undermined by the knowledge that he refrained from presenting false testimony. See *id.*, at 694.

This Court long ago noted: "All perjured relevant testimony is at war with justice, since it may produce a judgment not resting on truth. Therefore it cannot be denied that it tends to defeat the sole ultimate objective of a trial." *In re Michael*, 326 U. S. 224, 227 (1945). When the Court has been faced with a claim by a defendant concerning prosecutorial use of such evidence, it has "consistently held that a conviction obtained by the knowing use of perjured testimony is fundamentally unfair, and must be set aside if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury" (footnote omitted). *United States* v. *Agurs*, 427 U. S. 97, 103 (1976). See also, *e. g., Napue* v. *Illinois*, 360 U. S. 264, 269 (1959); *Pyle* v. *Kansas*, 317 U. S. 213, 216 (1942); *Mooney* v. *Holohan*, 294 U. S. 103, 112 (1935). Similarly, the Court has viewed a defendant's use of such testimony as so antithetical to our system of justice that it has permitted the prosecution to introduce otherwise inadmissible evidence to combat it. See, *e. g., United States* v. *Havens*, 446 U. S. 620, 626–627 (1980); *Oregon* v. *Hass*, 420 U. S. 714, 720–723 (1975); *Harris* v. *New York*, 401 U. S. 222, 225–226 (1971); *Walder* v. *United States*, 347 U. S. 62, 65 (1954). The proposition that presenting false evidence could contribute to (or that withholding such evidence could detract from) the reliability of a criminal trial is simply untenable.

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[4] This is not to say that a lawyer's threat to reveal his client's confidences may never have other effects on a defendant's trial. Cf. *United States ex rel. Wilcox* v. *Johnson*, 555 F. 2d 115 (CA3 1977) (finding a violation of Sixth Amendment when an attorney's threat to reveal client's purported perjury caused defendant not to take the stand at all).

It is no doubt true that juries sometimes have acquitted defendants who should have been convicted, and sometimes have based their decisions to acquit on the testimony of defendants who lied on the witness stand. It is also true that the Double Jeopardy Clause bars the reprosecution of such acquitted defendants, although on occasion they can be prosecuted for perjury. See, *e. g., United States* v. *Williams*, 341 U. S. 58, 63–65 (1951). But the privilege every criminal defendant has to testify in his own defense "cannot be construed to include the right to commit perjury." *Harris* v. *New York*, 401 U. S., at 225.[5] To the extent that Whiteside's

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[5] Whiteside was not deprived of the right to testify in his own defense, since no suggestion has been made that Whiteside's testimony was restricted in any way beyond the fact that he did not claim, falsely, to have seen a gun in Love's hand.

I must confess that I am somewhat puzzled by the Court's implicit suggestion that whether a defendant has a constitutional right to testify in his own defense remains an open question. *Ante*, at 5–6. It is true that in *Ferguson* v. *Georgia*, 365 U. S. 570 (1961), the Court expressly declined to claim rests on the assertion that he would have been acquitted had he been able to testify falsely, Whiteside claims a right the law simply does not recognize. "A defendant has no entitlement to the luck of a lawless decisionmaker, even if a lawless decision cannot be reviewed." *Strickland* v. *Washington*, 466 U. S., at 695. Since Whiteside was deprived of neither a fair trial nor any of the specific constitutional rights designed to guarantee a fair trial, he has suffered no prejudice.

The Court of Appeals erred in concluding that prejudice should have been presumed. *Strickland* v. *Washington* found such a presumption appropriate in a case where an attorney labored under "'an actual conflict of interest [that] adversely affected his . . . performance,'" *id.*, at 692, quoting *Cuyler* v. *Sullivan*, 446 U. S., at 348. In this case, however, no actual conflict existed. I have already discussed why Whiteside had no right to Robinson's help in presenting perjured testimony. Moreover, Whiteside has identified no right to insist that Robinson keep confidential a plan to commit perjury. See *Committee on Professional Ethics and Conduct of the Iowa State Bar Association* v. *Crary*, 245 N. W. 2d 298, 306 (Iowa 1976). The prior cases where this Court has reversed convictions involved conflicts that infringed a defendant's legitimate interest in vigorous protection of his constitutional rights. See, *e. g.*, *Wood* v. *Georgia*,

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address the question of a defendant's constitutional right to testify, but that was because the case did not properly raise the issue. *Id.*, at 572, n. 1. Since then, the Court repeatedly has referred to the existence of such a right. See, *e. g.*, *Jones* v. *Barnes*, 463 U. S. 745, 751 (1983) (the defendant has the "ultimate authority to make certain fundamental decisions regarding the case, [such as] . . . whether to . . . testify in his or her own behalf"); *Brooks* v. *Tennessee*, 406 U. S. 605, 612 (1972) ("Whether the defendant is to testify is an important tactical decision as well as a matter of constitutional right."); *Harris* v. *New York*, *supra*. I cannot imagine that if we were presented with a state statute that prohibited a defendant from testifying at his own trial, we would not rule that it violates both the Sixth and Fourteenth Amendments, as well as, perhaps, the Fifth.

450 U. S. 261, 268–271 (1981) (defense attorney paid by defendants' employer might have pursued employer's interest in litigating a test case rather than obtaining leniency for his clients by cooperating with prosecution); *Glasser* v. *United States*, 315 U. S. 60, 72–75 (1942) (defense attorney who simultaneously represented two defendants failed to object to certain potentially inadmissible evidence or to cross-examine a prosecution witness in an apparent attempt to minimize one codefendant's guilt). Here, Whiteside had no legitimate interest that conflicted with Robinson's obligations not to suborn perjury and to adhere to the Iowa Code of Professional Responsibility.

In addition, the lawyer's interest in not presenting perjured testimony was entirely consistent with Whiteside's best interest. If Whiteside had lied on the stand, he would have risked a future perjury prosecution. Moreover, his testimony would have been contradicted by the testimony of other eyewitnesses and by the fact that no gun was ever found. In light of that impeachment, the jury might have concluded that Whiteside lied as well about his lack of premeditation and thus might have convicted him of first-degree murder. And if the judge believed that Whiteside had lied, he could have taken Whiteside's perjury into account in setting the sentence. *United States* v. *Grayson*, 438 U. S. 41, 52–54 (1978).[6] In the face of these dangers, an attorney could reasonably conclude that dissuading his client from committing perjury was in the client's best interest and comported with standards of professional responsibility.[7] In short, Whiteside failed to show the kind of conflict that poses a danger to the values of zealous and loyal representation embodied in the Sixth Amendment. A presumption of prejudice is therefore unwarranted.

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[6] In fact, the State apparently asked the trial court to impose a sentence of 75 years, see Tr. 4 (Aug. 26, 1977), but the judge sentenced Whiteside to 40 years' imprisonment instead.

[7] This is not to say that an attorney's ethical obligations will never conflict with a defendant's right to effective assistance. For example, an attorney who has previously represented one of the State's witnesses has a continuing obligation to that former client not to reveal confidential information received during the course of the prior representation. That continuing duty could conflict with his obligation to his present client, the

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In light of respondent's failure to show any cognizable prejudice, I see no need to "grade counsel's performance." *Strickland* v. *Washington*, 466 U. S., at 697. The only federal issue in this case is whether Robinson's behavior deprived Whiteside of the effective assistance of counsel; it is not whether Robinson's behavior conformed to any particular code of legal ethics.

Whether an attorney's response to what he sees as a client's plan to commit perjury violates a defendant's Sixth Amendment rights may depend on many factors: how certain the attorney is that the proposed testimony is false, the stage of the proceedings at which the attorney discovers the plan, or the ways in which the attorney may be able to dissuade his client, to name just three. The complex interaction of factors, which is likely to vary from case to case, makes inappropriate a blanket rule that defense attorneys must reveal, or threaten to reveal, a client's anticipated perjury to the court. Except in the rarest of cases, attorneys who adopt "the role of the judge or jury to determine the facts," *United States ex rel. Wilcox* v. *Johnson*, 555 F. 2d 115, 122 (CA3 1977), pose a danger of depriving their clients of the zealous and loyal advocacy required by the Sixth Amendment.[8]

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defendant, to cross-examine the State's witnesses zealously. See Lowenthal, *Successive Representation by Criminal Lawyers*, 93 Yale L. J. 1 (1983).

[8] A comparison of this case with *Wilcox* is illustrative. Here, Robinson testified in detail to the factors that led him to conclude that respondent's assertion he had seen a gun was false. See, *e. g.*, Tr. 38–39, 43, 59 (July 29, 1977). The Iowa Supreme Court found "good cause" and "strong support" for Robinson's conclusion. *State* v. *Whiteside*, 272 N. W. 2d, at 471. Moreover, Robinson gave credence to those parts of Whiteside's account

I therefore am troubled by the Court's implicit adoption of a set of standards of professional responsibility for attorneys in state criminal proceedings. See *ante*, at 9–12. The States, of course, do have a compelling interest in the integrity of their criminal trials that can justify regulating the length to which an attorney may go in seeking his client's acquittal. But the American Bar Association's implicit suggestion in its brief *amicus curiae* that the Court find that the Association's Model Rules of Professional Conduct should govern an attorney's responsibilities is addressed to the wrong audience. It is for the States to decide how attorneys should conduct themselves in state criminal proceedings, and this Court's responsibility extends only to ensuring that the restrictions a State enacts do not infringe a defendant's federal constitutional rights. Thus, I would follow the suggestion made in the joint brief *amici curiae* filed by 37 States at the certiorari stage that we allow the States to maintain their "differing approaches" to a complex ethical question. Brief for the State of Indiana, *et al.*, as *Amici Curiae* 5. The signal merit of asking first whether a defendant has shown any adverse prejudicial effect before inquiring into his attorney's performance is that it avoids unnecessary federal interference in a State's regulation of its bar. Because I conclude that the respondent in this case failed to show such an effect, I join the Court's judgment that he is not entitled to federal habeas relief.

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which, although he found them implausible and unsubstantiated, were not clearly false. See Tr. 52–53 (July 29, 1977). By contrast, in *Wilcox*, where defense counsel actually informed the judge that she believed her client intended to lie and where her threat to withdraw in the middle of the trial led the defendant not to take the stand at all, the Court of Appeals found "no evidence on the record of this case indicating that Mr. Wilcox intended to perjure himself," and characterized counsel's beliefs as "private conjectures about the guilt or innocence of [her] client." 522 F. 2d, at 122.

SUPREME COURT OF THE UNITED STATES

No. 84–1321

CRISPUS NIX, WARDEN, PETITIONER *v.* EMANUEL CHARLES WHITESIDE

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

[February 26, 1986]

JUSTICE STEVENS, concurring in the judgment.

Justice Holmes taught us that a word is but the skin of a living thought. A "fact" may also have a life of its own. From the perspective of an appellate judge, after a case has been tried and the evidence has been sifted by another judge, a particular fact may be as clear and certain as a piece of crystal or a small diamond. A trial lawyer, however, must often deal with mixtures of sand and clay. Even a pebble that seems clear enough at first glance may take on a different hue in a handful of gravel.

As we view this case, it appears perfectly clear that respondent intended to commit perjury, that his lawyer knew it, and that the lawyer had a duty—both to the court and to his client, for perjured testimony can ruin an otherwise meritorious case—to take extreme measures to prevent the perjury from occurring. The lawyer was successful and, from our unanimous and remote perspective, it is now pellucidly clear that the client suffered no "legally cognizable prejudice."

Nevertheless, beneath the surface of this case there are areas of uncertainty that cannot be resolved today. A lawyer's certainty that a change in his client's recollection is a harbinger of intended perjury—as well as judicial review of such apparent certainty—should be tempered by the realization that, after reflection, the most honest witness may recall (or sincerely believe he recalls) details that he previously overlooked. Similarly, the post-trial review of a lawyer's pre-trial threat to expose perjury that had not yet been committed—and, indeed, may have been prevented by the threat—is by no means the same as review of the way in which such a threat may actually have been carried out. Thus, one can be convinced—as I am—that this lawyer's actions were a proper way to provide his client with effective representation without confronting the much more difficult questions of what a lawyer must, should, or may do after his client has given testimony that the lawyer does not believe. The answer to such questions may well be colored by the particular circumstances attending the actual event and its aftermath.

Because JUSTICE BLACKMUN has preserved such questions for another day, and because I do not understand him to imply any adverse criticism of this lawyer's representation of his client, I join his opinion concurring in the judgment.

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SUPREME COURT OF THE UNITED STATES

No. 84-1362

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PUBLIC SERVICE COMMISSION OF MARYLAND, PETITIONER *v.* CHESAPEAKE AND POTOMAC TELEPHONE COMPANY OF MARYLAND

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

[May 27, 1986]

CONTIN

PER CURIAM.

We vacate the judgment of the Court of Appeals for the Fourth Circuit and remand for further proceedings consistent with the opinion in *Louisiana Public Service Comm'n* v. *FCC*, *ante*, at ——.

It is so ordered.

JUSTICE POWELL and JUSTICE O'CONNOR took no part in the consideration or decision of this case.

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(Slip Opinion)

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Lumber Co.*, 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus [illegible]

WISCONSIN DEPARTMENT OF INDUSTRY, LABOR AND HUMAN RELATIONS ET AL. *v.* GOULD INC.

APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 84-1484. Argued December 9, 1985—Decided February 26, 1986

A Wisconsin statute debars persons or firms who have violated the National Labor Relations Act (NLRA) three times within a 5-year period from doing business with the State. The debarment lasts for three years. After appellee was debarred in 1982, it filed an action for injunctive and declaratory relief in Federal District Court, claiming, *inter alia*, that the Wisconsin statute was pre-empted by the NLRA. The court agreed and granted summary judgment for appellee. The Court of Appeals affirmed.

Held: The NLRA pre-empts the Wisconsin debarment statute. Pp. 4–9.

(a) States are prevented not only from setting forth standards of conduct inconsistent with the NLRA's substantive requirements, but also from providing their own regulatory or judicial remedies for conduct prohibited or arguably prohibited by the NLRA. Because the Wisconsin debarment statute functions as a supplemental sanction for violations of the NLRA, it conflicts with the National Labor Relations Board's comprehensive regulation of industrial relations in precisely the same way as would a prohibition against private parties within the State doing business with repeat labor law violators. That Wisconsin has chosen to use its spending power rather than its police power in enacting the debarment statute does not significantly lessen the inherent potential for conflict when two separate remedies are brought to bear on the same activity. Pp. 4–7.

(b) Although state action in the nature of "market participation" is not subject to the restrictions placed on state regulatory power by the Commerce Clause, Wisconsin by prohibiting state purchases from repeat labor law violators is not functioning as a private purchaser; its debarment scheme is tantamount to regulation. In any event, the "market

Syllabus

participant" doctrine reflects the particular concerns underlying the Commerce Clause, not any general notion regarding the necessary extent of state power in areas where Congress has acted, as it has here in enacting the NLRA. This is not a case where a State's spending policies address conduct that is of such "peripheral concern" to the NLRA or that implicates "interests so deeply rooted in local feeling and responsibility" that pre-emption should not be inferred. Nor is it a case where spending determinations that bear on labor relations were intentionally left to the States by Congress. The manifest purpose and inevitable effect of the Wisconsin debarment scheme is to enforce the requirements of the NLRA. Pp. 7–9.

750 F. 2d 608, affirmed.

BLACKMUN, J., delivered the opinion for a unanimous Court.

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SUPREME COURT OF THE UNITED STATES

No. 84–1484

WISCONSIN DEPARTMENT OF INDUSTRY, LABOR AND HUMAN RELATIONS, ET AL., APPELLANTS *v.* GOULD INC.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

[February 26, 1986]

JUSTICE BLACKMUN delivered the opinion of the Court.

The question in this case is whether the National Labor Relations Act (NLRA), 29 U. S. C. § 151 *et seq.*, pre-empts a Wisconsin statute debarring certain repeat violators of the Act from doing business with the State. We hold that it does.

I

Wisconsin has directed its Department of Industry, Labor and Human Relations to maintain a list of every person or firm found by judicially enforced orders of the National Labor Relations Board to have violated the NLRA in three separate cases within a 5-year period. See Wis. Stat. § 101.245 (Supp. 1985).[1] State procurement agents are statutorily forbidden to purchase "any product known to be manufactured or sold by any person or firm included on the list of labor law violators." § 16.75(8).[2] A name remains on the violators' list for three years. § 101.245(4).

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[1] Section 101.245 provides in relevant part:

"(1) The department [of industry, labor and human relations] shall maintain a list of persons or firms that have been found by the national labor relations board, and by 3 different final decisions of a federal court as determined under sub. (1m), if the 3 final decisions involved a cumulative finding of at least three separate violations, to have violated the national labor relations act, 29 U. S. C. 151 et seq., and of persons or firms that have been found to be in contempt of court for failure to correct a violation of the national labor relations act on 3 or more occasions by a court within a 5-year period as determined under sub. (1m) if the 3 contempt findings involved a cumulative total of at least 3 different violations.

Appellee Gould Inc. is a Delaware corporation with its principal place of business in Illinois. In 1982, Wisconsin placed Gould on its list of labor law violators following the judicial enforcement of four Board orders against various divisions of the company, none of which was located in Wisconsin and none of which Gould still owned at the time of its debarment. The State informed Gould that it would enter into no

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"(1m) On or before July 1 of each year the department shall compile the list required under sub. (1) based upon the 5-year period which ended on September 30 of the year preceding.

"(2) This list may be compiled from the records of the national labor relations board.

"(3) Whenever a new name is added to this list the department shall send the name to the department of administration for actions as provided in s. 16.75(8).

"(4) A name shall remain on the list for 3 years."

The statute was enacted as 1979 Wis. Laws, ch. 340, § 3. It became effective May 21, 1980.

[2] Section 16.75(8) provides in relevant part:

"The department [of administration] shall not purchase any product known to be manufactured or sold by any person or firm included on the list of labor law violators compiled by the department of industry, labor and human relations under s. 101.245. The secretary may waive this subsection if maintenance, repair or operating supplies are required to maintain systems or equipment which were purchased by the state from a person or firm included on the list prior to the date of inclusion on the list, or if the secretary finds that there exists an emergency which threatens the public health, safety or welfare and a waiver is necessary to meet the emergency."

We are advised that the statutory ban applies only to purchases by the State and not to purchasing decisions of counties, municipalities, or other political subdivisions of the State. Tr. of Oral Arg. 4.

In addition to disqualifying repeat violators of the NLRA, Wisconsin provides statutory preferences to bids from Wisconsin companies, minority businesses, employers of disabled workers, and prison industries. See Wis. Stat. §§ 16.75(1)(a), (3m)(b), (3s)(a), and (3t)(c) (Supp. 1985).

new contract with the company until 1985. The State also announced that it would continue its current contracts with Gould only as long as necessary to avoid contractual penalties, and that while Gould was on the list the State would not purchase products containing components produced by the company. At the time, Gould held state contracts worth over $10,000, and had outstanding bids for additional contracts in excess of $10,000.

Gould filed this action for injunctive and declaratory relief, arguing that the Wisconsin debarment scheme was preempted by the NLRA and violated the Due Process and Equal Protection Clauses of the Fourteenth Amendment.[3] The United States District Court for the Western District of Wisconsin granted Gould summary judgment on the preemption claim, and did not reach the arguments pertaining to the Fourteenth Amendment. 576 F. Supp. 1290 (1983). The court enjoined the defendant state officials from refusing to do business with Gould, from refusing to purchase products with Gould components, and from including Gould on the list of labor law violators. *Id.*, at 1299; App. to Juris. Statement 86, 87.[4] The Court of Appeals for the Seventh Circuit affirmed in relevant part. 750 F. 2d 608 (1984). We noted probable jurisdiction, 471 U. S. —— (1985). As did the District Court and the Court of Appeals, we find it necessary to reach only the pre-emption issue.

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[3] The original complaint also sought monetary damages, but Gould apparently abandoned this request in its motion and briefs for summary judgment. See 576 F. Supp. 1290, 1293, n. 3 (WD Wis. 1983).

Although Gould's debarment was scheduled to end in 1985, Wisconsin does not contend that the case is moot. At a minimum, the problem presented is "capable of repetition, yet evading review." *E. g.*, *Dunn* v. *Blumstein*, 405 U. S. 330, 333 n. 2 (1972); *Moore* v. *Oglivie*, 394 U. S. 814, 816 (1969); *Southern Pacific Terminal Co.* v. *ICC*, 219 U. S. 498, 515 (1911).

[4] The complaint named as defendants three state agencies, including the Department of Industry, Labor and Human Relations, and four state officials. The District Court dismissed the agency defendants under the Eleventh Amendment but, pursuant to *Ex parte Young*, 209 U. S. 123 (1908), allowed the suit to proceed against the state officials. 576 F. Supp., at 1293. Gould did not appeal the dismissal of the agency defendants, and they appear in this Court only as nominal parties under the Court's Rule 10.4.

II

It is by now a commonplace that in passing the NLRA Congress largely displaced state regulation of industrial relations. Although some controversy continues over the Act's pre-emptive scope, certain principles are reasonably settled. Central among them is the general rule set forth in *San Diego Building Trades Council* v. *Garmon*, 359 U. S. 236 (1959), that States may not regulate activity that the NLRA protects, prohibits, or arguably protects or prohibits. Because "conflict is imminent" whenever "two remedies are brought to bear on the same activity," *Garner* v. *Teamsters*, 346 U. S. 485, 498–499 (1953), the *Garmon* rule prevents States not only from setting forth standards of conduct inconsistent with the substantive requirements of the NLRA, but also from providing their own regulatory or judicial remedies for conduct prohibited or arguably prohibited by the Act. See 359 U. S., at 247. The rule is designed to prevent "conflict in its broadest sense" with the "complex and interrelated federal scheme of law, remedy, and administration," *id.*, at 243, and this Court has recognized that "[c]onflict in technique can be fully as disruptive to the system Congress erected as conflict in overt policy." *Motor Coach Employees* v. *Lockridge*, 403 U. S. 274, 287 (1971).

Consequently, there can be little doubt that the NLRA would prevent Wisconsin from forbidding *private parties* within the State from doing business with repeat labor law violators. Like civil damages for picketing, which the Court refused to allow in *Garmon*, a prohibition against in-state private contracts would interfere with Congress' "integrated scheme of regulation" by adding a remedy to those prescribed by the NLRA. 359 U. S., at 247. Nor does it matter that a supplemental remedy is different in kind from those that may be ordered by the Board, for "judicial concern has necessarily focused on the nature of the activities which the States have sought to regulate, rather than on the method of regulation adopted." *Id.*, at 243; *Lockridge*, 403 U. S., at 292. Indeed, "to allow the State to grant a remedy . . . which has been withheld from the National Labor Relations Board only accentuates the danger of conflict," *Garmon*, 359 U. S., at 247, because "the range and nature of those remedies that are and are not available is a fundamental part" of the comprehensive system established by Congress. *Lockridge*, 403 U. S., at 287.

Wisconsin does not assert that it could bar its residents from doing business with repeat violators of the NLRA. It contends, however, that the statutory scheme invoked against Gould escapes pre-emption because it is an exercise of the State's spending power rather than its regulatory power. But that seems to us a distinction without a difference, at least in this case, because on its face the debarment statute serves plainly as a means of enforcing the NLRA. The State concedes, as we think it must, that the point of the statute is to deter labor law violations and to reward "fidelity to the law." Tr. of Oral Arg. 4, 6; Brief for Defendants in Support of Motion for Summary Judgment 18. No other purpose could credibly be ascribed, given the rigid and undiscriminating manner in which the statute operates: firms adjudged to have violated the NLRA three times are automatically deprived of the opportunity to compete for the State's business.[5]

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[5] The conflict between the challenged debarment statute and the NLRA is made all the more obvious by the essentially punitive rather than corrective nature of Wisconsin's supplemental remedy. The regulatory scheme established for labor relations by Congress is "essentially remedial," and the Board is not generally authorized to impose penalties solely for the purpose of deterrence or retribution. *Republic Steel Corp.* v. *NLRB*, 311 U. S. 7, 10–12 (1940). Wisconsin's debarment sanction, in contrast, functions as punishment and serves no corrective purpose. Punitive sanctions

Because Wisconsin's debarment law functions unambiguously as a supplemental sanction for violations of the NLRA, it conflicts with the Board's comprehensive regulation of industrial relations in precisely the same way as would a state statute preventing repeat labor law violators from doing any business with private parties within the State. Moreover, if Wisconsin's debarment law is valid, nothing prevents other States from taking similar action against labor law violators. Indeed, at least four other States already have passed legislation disqualifying repeat or continuing offenders of the NLRA from competing for state contracts.[6] Each additional statute incrementally diminishes the Board's control over enforcement of the NLRA and thus further detracts from the "integrated scheme of regulation" created by Congress.

That Wisconsin has chosen to use its spending power rather than its police power does not significantly lessen the inherent potential for conflict when "two separate remedies are brought to bear on the same activity," *Garner*, 346 U. S., at 498–499. To uphold the Wisconsin penalty simply because it operates through state purchasing decisions therefore would make little sense. "It is the conduct being regulated,

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are inconsistent not only with the remedial philosophy of the NLRA, but also in certain situations with the Act's procedural logic. For example, the Board's certification of a bargaining representative is not subject to direct judicial appeal. An employer who believes that the Board erred in approving an election or defining a bargaining unit thus may obtain administrative and judicial review only by refusing to bargain and awaiting an enforcement action by the Board for violation of the Act. See *Magnesium Casting Co.* v. *NLRB*, 401 U. S. 137, 139 (1971); *AFL* v. *NLRB*, 308 U. S. 401 (1940). One of Gould's violations in fact occurred in precisely this manner. See *Gould, Inc., Elec. Components Div.* v. *NLRB*, 610 F. 2d 316 (CA5 1980). An unsuccessful challenge of this sort, if pursued in good faith, will generally present an especially inappropriate occasion for punitive sanctions.

[6] See Conn. Gen. Stat. § 31–57a (Supp. 1985); Md. State Finance & Procurement Code Ann. § 13–404 (1985); Mich. Comp. Laws §§ 423.322, .323, and .324 (Supp. 1985); Ohio Rev. Code Ann. § 121.23 (1984).

not the formal description of governing legal standards, that is the proper focus of concern." *Lockridge*, 403 U. S., at 292.

III

Wisconsin notes correctly that state action in the nature of "market participation" is not subject to the restrictions placed on state regulatory power by the Commerce Clause. See *White* v. *Massachusetts Council of Constr. Employers, Inc.*, 460 U. S. 204 (1983); *Reeves, Inc.* v. *Stake*, 447 U. S. 429 (1980); *Hughes* v. *Alexandria Scrap Corp.*, 426 U. S. 794 (1976). We agree with the Court of Appeals, however, that by flatly prohibiting state purchases from repeat labor law violators Wisconsin "simply is not functioning as a private purchaser of services," 750 F. 2d, at 614; for all practical purposes, Wisconsin's debarment scheme is tantamount to regulation.

In any event, the "market participant" doctrine reflects the particular concerns underlying the Commerce Clause, not any general notion regarding the necessary extent of state power in areas where Congress has acted. In addition to authorizing congressional action, the Commerce Clause limits state action in the absence of federal approval. The Clause restricts "state taxes and regulatory measures impeding free private trade in the national marketplace," but "[t]here is no indication of a constitutional plan to limit the ability of the States themselves to operate freely in the free market." *Reeves*, 447 U. S., at 437. The NLRA, in contrast, was designed in large part to "entrus[t] administration of the labor policy for the Nation to a centralized administrative agency." *Garmon*, 359 U. S., at 242; see also, *e. g.*, *NLRB* v. *Nash-Finch Co.*, 404 U. S. 138, 145 (1971) ("The Board is the sole protector of the 'national interest' defined with particularity in the Act.") (footnote omitted). What the Commerce Clause would permit States to do in the absence of the NLRA is thus an entirely different question from what States may do with the Act in place. Congressional purpose is of course "'the ultimate touchstone'" of pre-emption analysis, see, *e. g.*, *Allis-Chalmers Corp.* v. *Lueck*, —— U. S. ——, —— (1985) (slip op. 6), quoting *Retail Clerks* v. *Schermerhorn*, 375 U. S. 96, 103 (1963), and we cannot believe that Congress intended to allow States to interfere with the "interrelated federal scheme of law, remedy, and administration," *Garmon*, 359 U. S., at 243, under the NLRA as long as they did so through exercises of the spending power.

Nothing in the NLRA, of course, prevents private purchasers from boycotting labor law violators. But government occupies a unique position of power in our society, and its conduct, regardless of form, is rightly subject to special restraints. Outside the area of Commerce Clause jurisprudence, it is far from unusual for federal law to prohibit States from making spending decisions in ways that are permissible for private parties. See, *e. g.*, *Elrod* v. *Burns*, 427 U. S. 347 (1976); *Perry* v. *Sinderman*, 408 U. S. 593 (1972). The NLRA, moreover, has long been understood to protect a range of conduct against state but not private interference. See, *e. g.*, *Machinists* v. *Wisconsin Employment Relations Comm'n*, 427 U. S. 132, 148–151 (1976); *Teamsters* v. *Morton*, 377 U. S. 252, 259–260 (1964); Cox, Labor Law Preemption Revisited, 85 Harv. L. Rev. 1337, 1346, 1351–1359 (1972). The Act treats state action differently from private action not merely because they frequently take different forms, but also because in our system States simply are different from private parties and have a different role to play.

We do not say that state purchasing decisions may never be influenced by labor considerations, any more than the NLRA prevents state regulatory power from ever touching on matters of industrial relations. Doubtless some state spending policies, like some exercises of the police power, address conduct that is of such "peripheral concern" to the NLRA, or that implicates "interests so deeply rooted in local feeling and responsibility," that pre-emption should not be inferred. *Garmon*, 359 U. S., at 243–244; see also, *e. g.*, *Belknap, Inc.* v. *Hale*, 463 U. S. 491, 498 (1983). And some spending determinations that bear on labor relations were intentionally left to the States by Congress. See *New York Tel. Co.* v. *New York State Labor Dept.*, 440 U. S. 519 (1979). But Wisconsin's debarment rule clearly falls into none of these categories. We are not faced here with a statute that can even plausibly be defended as a legitimate response to state procurement constraints or to local economic needs, or with a law that pursues a task Congress intended to leave to the States. The manifest purpose and inevitable effect of the debarment rule is to enforce the requirements of the NLRA. That goal may be laudable, but it assumes for the State of Wisconsin a role Congress reserved exclusively for the Board.

The judgment of the Court of Appeals is affirmed.

It is so ordered.

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(Slip Opinion)

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Lumber Co.*, 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

NATIONAL LABOR RELATIONS BOARD *v.* FINANCIAL INSTITUTION EMPLOYEES OF AMERICA, LOCAL 1182, CHARTERED BY UNITED FOOD & COMMERCIAL WORKERS INTERNATIONAL UNION, AFL–CIO, ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 84–1493. Argued December 4, 1985—Decided February 26, 1986*

In 1970, the National Labor Relations Board (Board) certified the Firstbank Independent Employees Association (Firstbank) as the collective-bargaining representative of a bargaining unit consisting of the employees of Seattle-First National Bank (SeaFirst), and successive collective-bargaining agreements were negotiated. In 1978, in an election in which only union members were allowed to vote, Firstbank voted to affiliate with an international union and changed its name to the Financial Institution Employees of America, Local 1182 (FIEA). FIEA then petitioned the Board to amend its certification to reflect this change. After initially granting the petition and holding that SeaFirst had committed an unfair labor practice by refusing to recognize the amended certification or to bargain with FIEA, the Board, on reconsideration, held that, because nonunion employees were not allowed to vote in the affiliation election, the election did not meet minimal "due process" standards and that therefore the affiliation was invalid. Accordingly, the Board dismissed FIEA's unfair labor practice charge and vacated the amended certification. The Court of Appeals granted FIEA's petition for review of the Board's decision and remanded the case, holding that

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*Together with No. 84–1509, *Seattle-First National Bank* v. *Financial Institution Employees of America, Local 1182, Chartered by United Food & Commercial Workers International Union, AFL–CIO, et al.*, also on certiorari to the same court.

the Board's requirement that nonunion employees be allowed to vote on affiliation questions was irrational and inconsistent with the National Labor Relations Act (Act).

Held: The Board exceeded its authority under the Act in requiring that nonunion employees be allowed to vote for affiliation before it would order the employer to bargain with the affiliated union. Pp. 5–16.

(a) Such requirement dramatically changes the scheme under which the Board's practice has been to grant an independent union's petition to amend the union's certification to reflect a name change resulting from affiliation with a national or international union if the Board found that union members had an adequate opportunity to vote on affiliation and that there was substantial "continuity" between the preaffiliation and postaffiliation union. Pp. 5–8.

(b) Under the Act, the certified union must be recognized as the exclusive bargaining representative of all employees in the bargaining unit, and the Board cannot discontinue that recognition without determining that the affiliation of that union with another union raises a question of representation and, if so, conducting an election to decide whether the certified union is still the choice of a majority of the unit. Here, by refusing either to amend FIEA's certification or to order SeaFirst to bargain, the Board effectively circumvented the decertification procedures provided for by the Act. Moreover, the Board's requirement that nonunion employees be allowed to vote in the affiliation election violated the policy Congress incorporated into the Act against outside interference in union decisionmaking. Pp. 8–11.

(c) Employees' dissatisfaction with representation is not a reason for requiring the union to allow nonunion employees to vote on union matters like affiliation. Rather, the Act allows union members to control the shape and direction of the union. Dissatisfaction with the decision union members make may be tested by a Board-conducted representation election only if it is unclear whether the recognized union retains majority support. Any distinction between affiliation and other changes in a union's organization and structure does not justify the Board's meddling in the union's internal affairs. Pp. 12–15.

(d) The Board's new rule contravenes the Act's assumption that stable bargaining relationships are best maintained by allowing an affiliated union to continue representing a bargaining unit unless the Board finds that the affiliation raises a question of representation. Such rule effectively gives the employer the power to veto an independent union's decision to affiliate, thereby allowing the employer to interfere directly with union decisionmaking that Congress intended to insulate from outside interference. Pp. 15–16.

752 F. 2d 356, affirmed and remanded.

Brennan, J., delivered the opinion of the Court, in which White, Marshall, Blackmun, Powell, Rehnquist, Stevens, and O'Connor, JJ., joined. Burger, C. J., filed an opinion concurring in the judgment.

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D. C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

Nos. 84–1493 AND 84–1509

NATIONAL LABOR RELATIONS BOARD, PETITIONER
84–1493 *v.*
FINANCIAL INSTITUTION EMPLOYEES OF AMERICA, LOCAL 1182, CHARTERED BY UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION, AFL–CIO ET AL.

SEATTLE-FIRST NATIONAL BANK, PETITIONER
84–1509 *v.*
FINANCIAL INSTITUTION EMPLOYEES OF AMERICA, ETC., ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

[February 26, 1986]

JUSTICE BRENNAN delivered the opinion of the Court.

The questions for decision in these cases is whether a rule of the National Labor Relations Board that requires that nonunion employees must be permitted to vote in a certified union's decision whether to affiliate with another union is consistent with the National Labor Relations Act.

I

In 1970, the Board certified the Firstbank Independent Employees Association (Firstbank) as the collective-bargaining representative of a bargaining unit consisting of the employees of petitioner Seattle-First National Bank (SeaFirst). Firstbank and SeaFirst subsequently negotiated successive collective-bargaining agreements, the most recent of which expired in 1977. In 1978, Firstbank voted to affiliate with the Retail Clerks International Union, AFL–CIO. Under Firstbank's constitution, only union members in good standing could vote in the election. The union members voted in favor of affiliation by a margin of 1206–774. Upon affiliation, Firstbank changed its name to the Financial Institution Employees of America, Local 1182 (FIEA), chartered by the Retail Clerk's International Union, AFL–CIO. FIEA then petitioned the Board to amend its certification to reflect this change. SeaFirst challenged the petition, arguing that affiliation with the Retail Clerks had substantially changed the union, that nonunion employees should have been allowed to vote on whether to affiliate, and that the union had not followed its own constitution in establishing voter eligibility standards. The Board rejected these arguments and amended Firstbank's certification to name FIEA as the employees' bargaining representative. *Seattle-First National Bank*, 241 N. L. R. B. 751 (1979).[1]

SeaFirst refused to recognize the amended certification or to bargain with FIEA. The Board sustained FIEA's charges and held that SeaFirst had committed an unfair labor practice in violation of sections 8(a)(1) and 8(a)(5) of the Act, 29 U. S. C. §§ 158(a)(1), 158(a)(5), and ordered it to bargain.[2] *Seattle-First National Bank*, 245 N. L. R. B. 700 (1979).

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[1] After the Board amended FIEA's certification, the Retail Clerks International Union merged with the Amalgated Meat Cutters and Butcher Workmen of North America to become the United Food and Commercial Workers International Union, AFL–CIO. The Board granted FIEA's motion to amend the name of the charging party in this case to reflect this change. *Seattle First National Bank*, 245 N. L. R. B. 700, 700, n. 1 (1979).

[2] Under section 8(a) of the Act, "[i]t shall be an unfair labor practice for an employer—

"(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;

. . . . .

"(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title."

SeaFirst petitioned the Court of Appeals for the Ninth Circuit for review of the Board's order, and the Board cross-applied for enforcement. Before the Court of Appeals rendered its decision, the Board moved for remand of the case to it, and the court granted the motion. *Seattle-First National Bank* v. *NLRB*, Nos. 79–7515, 80–7004 (June 27, 1980); see n. 4, *infra*.

On remand, the Board notified the parties of its decision on its own motion to reconsider its earlier decision. On reconsideration, the Board held that, because nonunion employees were not allowed to vote in the affiliation election, the election did not meet minimal "due process" standards, and therefore that the affiliation was invalid. Accordingly, the Board dismissed FIEA's unfair labor practice charge and vacated the amended certification. *Seattle-First National Bank*, 265 N. L. R. B. 426 (1982).

FIEA petitioned the Court of Appeals for the Ninth Circuit for review of the Board's decision. The Court of Appeals, in a 2–1 decision, granted the petition and remanded the case. 752 F. 2d 356 (1984). The court held that the Board's requirement that nonunion employees be allowed to vote on affiliation questions was irrational and inconsistent with the Act for three reasons. First, the Board's rule intruded upon the union's internal affairs—here a totally unjustified intrusion because the Board had not determined that affiliation had substantially changed the union or eroded its majority support—and violated the "longstanding federal labor policy of avoiding unnecessary interference in internal union affairs." *Id.*, at 362. Second, the Board's rule was "inconsistent with the strong national policy of maintaining stability in the bargaining representative." *Id.*, at 364. Pursuant to that policy, Congress and the Board had restricted the opportunities for employers and employees to challenge a certified union's status as bargaining representative,[3] and the Board's new rule did not further but breached the policy, since it effectively decertified the union without a Board determination that affiliation had undermined the union's majority support. Finally, the Board's rule was irrational, because the interests of nonunion employees were adequately protected under existing procedures, and because the Board's reasoning did not support the rule.

The holding of the Court of Appeals conflicts with contrary holdings of the Courts of Appeals for the Fifth and Seventh Circuits upholding the Board's rule. *Local Union No. 4-14* v. *NLRB*, 721 F. 2d 150, 152–153 (CA5 1983); *United Retail Workers Union, Local 881* v. *NLRB*, 774 F. 2d 752 (CA7 1985).[4] We granted both petitions in this case to to resolve the conflict. 471 U. S. —— (1985). We affirm.

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[3] The court cited three examples of Board rules designed to maintain stable bargaining relationships. 752 F. 2d, at 365. First, in cases in which the employer is charged with refusing to bargain with a certified union, the union enjoys a presumption of majority status. For the first year after certification, this presumption is irrebuttable. See *Brooks* v. *NLRB*, 348 U. S. 96, 103 (1954). Second, the Board will consider "decertifying" a union only if at least 30% of the employees present a petition, or in "extreme cases." See 29 CFR § 101.18 (1985); R. Gorman, Basic Text on Labor Law 49–50 (1976). Third, under its contract-bar rule, the Board ordinarily refuses to conduct decertification elections for a certain period of time while the collective-bargaining agreement remains in effect. See 1 C. Morris, The Developing Labor Law 361–376 (2d ed. 1983).

[4] The procedural history of the Fifth Circuit's decision is closely intertwined with this case. In that case, the employer refused to bargain with an affiliated union because only union members had been allowed to vote on affiliation. The Board ordered the employer to bargain. *Amoco Production Co.*, 220 N. L. R. B. 861 (1975), *aff'd*, 239 N. L. R. B. 1195 (1979). The Board relied on its *Amoco* decision when it originally amended FIEA's certification in this case. *Amoco* was then appealed to the Court of Appeals for the Fifth Circuit, which remanded the case for the Board to determine whether affiliation had substantially changed the union. *Amoco Production Co.* v. *NLRB*, 613 F. 2d 107, 112 (CA5 1980). In light of the strong similarity between the two cases, the Board asked the Ninth Circuit to remand this case as well. On remand from the Fifth Circuit, the Board did not address whether affiliation had substantially changed the union.

II

Section 7 of the Act guarantees employees the right "to bargain collectively through representatives of their own choosing," 29 U. S. C. § 157, and the Board is empowered to determine representation on petition of employees or the employer. 29 U. S. C. §§ 159(c)(1)(A)(i), 159(c)(1)(B). In either case, the Board investigates the petition and holds a hearing if it has reasonable cause to believe that a "question of representation" exists, 29 U. S. C. § 159(c), and directs a representation election by secret ballot to settle the question. *Ibid.* The Board certifies the winning union as the bargaining representative of all of the employees in the bargaining unit. The employer commits an unfair labor practice by refusing to bargain with the employees' certified bargaining representative. 29 U. S. C. § 158(a)(5).

The Act recognizes that employee support for a certified bargaining representative may be eroded by changed circumstances. In such cases, employees may petition the Board for another election, alleging that the certified representative no longer enjoys majority support. 29 U. S. C. § 159(c)(1)(A)(ii); 29 CFR §§ 101.17, 102.60(a) (1985). Similarly, an employer who questions whether a majority of employees continue to support a certified union may petition for another election. 29 U. S. C. § 159(c)(1)(B); 29 CFR §§ 101.17, 102.60(a) (1985); see 1 C. Morris, The Developing Labor Law 349 (2d ed. 1983). The employer, however, must "demonstrate by objective considerations that it has some reasonable grounds for believing that the union has lost its majority status." *United States Gypsum Co.*, 157 N. L. R. B. 652, 656

Rather, the Board reversed itself and concluded that the affiliation was invalid because only union members had been allowed to vote. *Amoco Production Co.*, 262 N. L. R. B. 1240 (1982). The Board in turn relied on this decision in dismissing FIEA's unfair labor practice charge and revoking its amended certification.

(1966); 29 CFR § 101.17 (1985); see Morris, *supra*. Again, if the Board determines, after investigation and hearing, that a question of representation exists, it directs an election by secret ballot and certifies the result. 29 U. S. C. § 159(c).

One such change in circumstances is, as here, where an independent union decides to affiliate with a national or international organization.[5] In many such cases, the union may also change its name to reflect its new affiliation, and will petition the Board to amend its certification to reflect this name change. 29 CFR §§ 101.17, 102.60(b) (1985). The Board's practice has been to grant such petitions if the Board found that the affiliation satisfied two conditions. First, that union members have had an adequate opportunity to vote on affiliation. *North Electric Co.*, 165 N. L. R. B. 942, 943 (1967). The Board ordinarily required that the affiliation election be conducted with adequate "due process" safeguards, including notice of the election to all members, an adequate opportunity for members to discuss the election, and reasonable precautions to maintain ballot secrecy. *E. g., Newspapers Inc.*, 210 N. L. R. B. 8, 9 (1974), enf'd, *NLRB* v. *Newspapers, Inc.*, 515 F. 2d 334 (CA5 1975).[6] Second, that there was substantial "continuity" between the pre- and post-affiliation union. The focus of this inquiry was whether the affiliation had substantially changed the union; the Board considered such factors as whether the union retained local autonomy and local officers, and continued to follow established procedures. See Note, *supra* n. 5, at 445, and nn. 74–82.[7] If the organizational changes accompanying affiliation were substantial enough to create a different entity, the affiliation raised a "question concerning representation" which could only be resolved through the Board's election procedure. 1 *Morris*, *supra*, at 690; 29 CFR §§ 101.17, 102.60(b) (1985). However, as long as continuity of representation and due process were satisfied, affiliation was considered an internal matter that did not affect the union's status as the employees' bargaining representative, and the employer was obligated to continue bargaining with the reorganized union. 1 *Morris*, *supra*, at 690–691; *Universal Tool & Stamping Co.*, 182 N. L. R. B. 254, 259 (1970).[8]

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[5] A local union may seek to affiliate with a larger organization for a variety of reasons. The larger organization may provide bargaining expertise or financial support, or may compensate for a lack of leadership within the local union. *Amoco Production Co.*, 239 N. L. R. B., at 1195; Hale, Union Affiliations: Examination of Governing NLRA Standards, 1983 Det. C. L. Rev. 709. Affiliation "is but one of many ways in which labor organizations alter their structures and alignments in response to changing economic and political conditions." Note, Union Affiliations and Collective Bargaining, 128 U. Pa. L. Rev. 430, 431 (1979). The Board has recognized that a union "must remain largely unfettered in its organizational quest for financial stability and aid in the negotiating process." *The Williamson Co.*, 244 N. L. R. B. 953, 955 (1979).

[6] The union suggests that it may even be inappropriate for the Board to impose due process safeguards with respect to union members. Brief for FIEA 28–29. While we note that the NLRA does not require unions to follow specified procedures in deciding matters such as affiliations, we need not assess the propriety of the Board's past procedures.

The Board's new rule dramatically changes this scheme.[9]

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[7] The parties disagree over whether affiliation substantially changed the union in this case. See Brief for NLRB 4, and n. 2; Brief for FIEA 4. However, the Board did not make a continuity determination but simply dismissed FIEA's unfair labor practice charge and vacated its amended certification. The Court of Appeals therefore declined to address the continuity issue. 752 F. 2d, 356, 359, n. 4 (1984). We also decline to address it.

[8] In some cases, the affiliated union will not petition the Board to amend its certification, but will instead wait to see whether the employer will continue to bargain. If the employer refuses to bargain, the union may then file an unfair labor practice charge with the Board. In the past, the Board required the employer to bargain if the affiliation satisfied its two-prong due process and continuity test. In other words, the Board used the same standards to examine affiliations whether the issue arose as a defense to an unfair labor practice charge or in a petition to amend a certification. *Independent Drug Store Owners of Santa Clara County*, 211 N. L. R. B. 701, 701, n. 2 (1974), enf'd, 528 F. 2d 1225 (CA9 1975); Hale, *supra* n. 5, at 710, and n. 8; Note, *supra* n. 5, at 432.

[9] The Board's assertion that it actually adopted its "new" rule in its deci-

The Board now takes the position that all employees in the bargaining unit—not merely union members—must have the opportunity to participate in the affiliation decision. See *Amoco Production Co.*, 262 N. L. R. B. 1240, 1241 (1982). Unless they are allowed to do so, the Board will not amend the union's certification or require the employer to bargain with the reorganized union. The Board applies this rule even though the organizational changes resulting from the affiliation are not substantial enough to raise a question of representation. See Brief for NLRB 16–17. The Board does not contend that the Act requires that all employees of the bargaining unit, union and nonunion, must be allowed to participate in the affiliation election or that the Act expressly authorizes the Board to impose such requirements. Rather, the Board and the employer defend the Board's new rule on two grounds. First, they assert that the Board's rule is a reasonable means of protecting the bargaining unit employees' right to select a bargaining representative under Section 7 of the Act. Second, they argue that the rule minimizes industrial strife. We address each argument in turn.

III

A

Petitioners argue that the Board should be afforded "a wide degree of discretion in establishing the procedure and safeguards necessary to insure the fair and free choice of bargaining representatives by employees," *NLRB.* v. *A. J. Tower Co.*, 329 U. S. 324, 330 (1946); see also 29 U. S. C. § 156; *NLRB* v. *Wyman-Gordon Co.*, 394 U. S. 759, 767

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sion in *Jasper Seating Co.*, 231 N. L. R. B. 1025 (1977) may be questioned. *Jasper* was a 3–2 decision in which only two members took the position that nonunion employees should be allowed to vote in affiliation elections. While suggesting that he could adopt this position under other circumstances, Member Penello concurred in the decision "based upon the application of [different] principles." *Id.*, at 1026. He found that the affiliation had raised a question of representation which could only be resolved through a Board-conducted representation election. *Id.*, at 1027.

(1969); *NLRB* v. *Waterman S.S. Corp.* 309 U. S. 206, 226 (1940), and contend that a requirement that all employees be allowed to vote on affiliation is a reasonable means of insuring that a majority of employees consent to representation by the postaffiliation union, and ultimately of protecting the right of all employees to select a bargaining representative. Our cases have previously recognized the Board's broad authority to construe provisions of the Act, and have deferred to Board decisions that are not irrational or inconsistent with the Act. *Ford Motor Co.* v. *NLRB*, 441 U. S. 488, 495, 497 (1979); *Beth Israel Hospital* v. *NLRB*, 437 U. S. 483, 501 (1978); *NLRB* v. *Iron Workers*, 434 U. S. 335, 350 (1978). However, the question here is whether the Board's new rule exceeds the Board's statutory authority. Cf. *NLRB* v. *Longshoreman*, 473 U. S. —— (1985); *NLRB* v. *Bildisco & Bildisco*, 465 U. S. 513 (1984). Deference to the Board "cannot be allowed to slip into a judicial inertia which results in the unauthorized assumption . . . of major policy decisions properly made by Congress." *American Ship Building Co.* v. *NLRB*, 380 U. S. 300, 318 (1965); see also *NLRB* v. *Insurance Agents*, 361 U. S. 477, 499 (1960). We hold that the Board's new rule exceeds its authority under the Act.

Under the Act, the certified union must be recognized as the exclusive bargaining representative of all employees in the bargaining unit, and the Board cannot discontinue that recognition without determining that the affiliation raises a question of representation and if so, conducting an election to decide whether the certified union still is the choice of a majority of the unit. 29 U. S. C. § 159(c). Of course, as is the case with any organizational and structural change, a new affiliation may substantially change a certified union's relationship with the employees it represents. These changed circumstances may in turn raise a "question of representation," if it is unclear whether a majority of employees continue to support the reorganized union. Thus, in these situations, the affiliation implicates the employees' right to select a bargaining representative, and to protect the employees' interests, the situation may require that the Board exercise its authority to conduct a representation election. 29 U. S. C. § 159(c)(1). However, the Board's decision must take into account that "[t]he industrial stability sought by the Act would unnecessarily be disrupted if every union organizational adjustment were to result in displacement of the employer-bargaining representative relationship." *Canton Sign Co.*, 174 N. L. R. B. 906, 909 (1969), enf. denied on other grounds, 457 F. 2d 832 (CA6 1972). In many cases, a majority of employees will continue to support the union despite any changes precipitated by affiliation.[10] In such situations, affiliation does not necessarily implicate the "selection" of a new bargaining representative. The reorganized union may legitimately claim to succeed as the employees' duly selected bargaining representative, and in that case retains a legitimate interest in continuing to bargain collectively with the employer. The Act balances these competing concerns by authorizing the Board to conduct a representation election *only* where affiliation raises a question of representation. 29 U. S. C. § 159(c). Conversely, where affiliation does not raise a question of representation, the statute gives the Board no authority to act. The Board's new rule upsets the accomodation drawn by the statute by effectively decertifying the reorganized union even where affiliation does not raise a question of representation.

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[10] The Board has recognized that "affiliation does not directly involve the employment relation. The status of wages, working conditions, benefits, and grievance procedures is unaffected by the affiliation vote; the collective-bargaining agreement between the union and the employer remains effective until the stated expiration date." *Amoco Production Co.*, 239 N. L. R. B., at 1195. Affiliation "has no probative value concerning the employees' choice of the [union] as their collective bargaining representative." *American Range Lines, Inc.*, 13 N. L. R. B. 139, 154 (1939); see also Brief for NLRB 16, n. 10 ("[t]he Board has in general found that affiliations do not destroy continuity of representation").

Turning to the record in this case, the Board revoked FIEA's certification and relieved SeaFirst of its obligation to bargain despite the fact, as the Board acknowledges, that it was not sufficient to raise a question of representation that nonunion employees were not allowed to vote in the affiliation election. Brief for NLRB 16–17. Absent a question of representation, FIEA continued to function, as it was entitled to do, as the bargaining representative of the unit, and SeaFirst was obligated to continue bargaining with it. By refusing either to amend FIEA's certification or to order SeaFirst to bargain, the Board effectively circumvented the decertification procedures provided for by statute. Moreover, the Board exceeded its statutory authority by requiring that nonunion employees be allowed to vote in the union's affiliation election. This violated the policy Congress incorporated into the Act against outside interference in union decision-making. See *Steelworkers* v. *Sadlowski*, 457 U. S. 102, 117 (1982); *NLRB* v. *Boeing Co.*, 412 U. S. 67, 71 (1973); *Scofield* v. *NLRB*, 394 U. S. 423, 428 (1969); *NLRB* v. *Allis-Chalmers Mfg. Co.*, 388 U. S. 175, 195 (1967). Petitioners maintain that this policy must give way to the right of the employees to select a bargaining representative. Cf. *Pattern Makers* v. *NLRB*, 473 U. S. —— (1985) (union rule barring resignations during a strike contrary to statutory policy of voluntary unionism); *NLRB* v. *Marine Workers*, 391 U. S. 418 (1968) (union rule requiring exhaustion of internal grievance procedures does not preclude Board review). But the Act establishes a specific election procedure to decide whether the employees desire a change in a certified union's representative status. While the Board is charged with responsibility to administer this procedure, the Act gives the Board no authority to require unions to follow other procedures in adopting organizational changes.[11]

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[11] Congress has expressly declined to prescribe procedures for union decision making in matters such as affiliation. When the NLRA was amended by the Labor Management Relations Act of 1947, the House

B

Petitioners contend that this statutory scheme does not adequately protect the interests of nonunion employees, and that this justifies the Board's new rule. They argue that an affiliation may affect a union's representation of the bargaining unit even if it does not raise a question of representation, but that argument overlooks the fact that a union makes many decisions that "affect" its representation of nonmember employees. It may decide to call a strike, ratify a collective-bargaining agreement, or select union officers and bargaining representatives. Under the Act, dissatisfied employees may petition the Board to hold a representation election, but the Board has no authority to conduct an election unless the effects complained of raise a question of representation. In any event, dissatisfaction with representation is not a reason for requiring the union to allow nonunion employees to vote

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passed a proposal that would have regulated union procedures for electing officers, assessing dues, disciplining members and deciding to strike. H. R. 3020, § 8(c), 80th Cong., 1st Sess. (1947), 1 NLRB, Legislative History of the Labor Management Relations Act, 1947, pp. 179–183 (Legis Hist.). These provisions were deleted from the final legislation. See 93 Cong.Rec. 6601 (1947), 2 Legis. Hist. 1540 ("The Senate conferees . . . felt that it was unwise to authorize [the N. L. R. B.] to undertake such elaborate policing of the internal affairs of unions"). In 1959, Congress adopted the Labor Management Reporting and Disclosure Act, which regulated union procedures for assessing dues, disciplining employees, and electing officers. 29 U. S. C. §§ 411–415, 481. Senators Knowland and McClellan both advanced proposals to regulate other sorts of union decisions. See 104 Cong. Rec. 11184 (1958) (constitutional amendments and recall of officers); *id.*, at 11461 (waiver of right to strike); S. 1137, § 102(5), 86th Cong., 1st Sess. (1959), 1 Legislative History of the Labor-Management Reporting and Disclosure Act 272–273 (1959) (creation of affiliated organizations or funds), § 103(4), *id.*, at 277 (mergers and transfers between local unions). None of these proposals was incorporated into the statute. See *Steelworkers* v. *Sadlowski*, 457 U. S. 102, 117 (1982) ("Congress was guided by the general principle that unions should be left free to 'operate their own affairs, as far as possible.' [citation omitted] It believed that only essential standards should be imposed by legislation.")

on union matters like affiliation. Rather, the Act allows union members to control the shape and direction of their organization, and "[n]on-union employees have no voice in the affairs of the union." *Allis-Chalmers*, 388 U. S., at 191. We repeat, dissatisfaction with the decisions union members make may be tested by a Board-conducted representation election only if it is unclear whether the reorganized union retains majority support.

Petitioners concede that a union's organizational and structural changes would not ordinarily justify the Board's meddling in a union's internal affairs, but argue that affiliation is different from other changes because affiliation necessarily changes the union's identity, and because initiation of the change is by the certified union seeking the Board's approval for the affiliation by amendment of its certification or an order on the employer to bargain after affiliation. Neither distinction is persuasive.

First, petitioners argue that affiliation differs from other organizational changes because it results in employees being represented by a different organization. See *Hamilton Tool Co.*, 190 N. L. R. B. 571, 576 (1971) (Miller, concurring). But many organizational or structural changes may operate to alter a union's "identity." This would be the case where the union amends its constitution or bylaws, restructures its financial obligations and resources, or alters its jurisdiction. The fact that an affiliation is often accompanied by a formal name change does not serve to distinguish it from other organizational developments. As the Board has recognized, "an affiliation does not create a new organization, nor does it result in the dissolution of an already existing organization." *Amoco Production Co.*, 239 N. L. R. B. 1195, 1195 (1979). Rather, the union will determine "whether any administrative or organizational changes are necessary in the affiliating organization." *Ibid.* If these changes are sufficiently dramatic to alter the union's identity, affiliation may raise a question of representation, and the Board may then conduct a representation election. Otherwise, the statute gives the Board no authority to interfere in the union's affairs.

Petitioners next contend that affiliation involves the union's asking the Board to amend its certification or to order the employer to bargain.[12] Petitioners assert that the Board therefore has a strong interest in insuring that its own election procedures have not been circumvented before placing its imprimatur on the union's affiliation election. This argument mischaracterizes the nature of the relevant procedures. In amending the union's certification or ordering the employer to bargain, the Board does not "sanction" the union's affiliation. Rather, it signifies only that the reorganized union continues as an ongoing entity that the employer should continue to recognize. By analogy, the fact that the Board may order the employer to bargain with a union that has amended its constitution does not mean that the Board has "sanctioned" the constitutional amendment. In any event, the Board's interest in insuring the integrity of its procedures does not empower it to adopt measures exceeding its statutory authority. If the Board finds that affiliation raises a question of representation "undermining . . . the

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[12] In its *amicus* brief, the Chamber of Commerce notes that the statute does not explicitly provide for petitions to amend a union's certification, and argues that the Board therefore has broad authority to refuse to grant such requests. However, because the union's request to amend its certification is a mere formality, it cannot give the Board additional authority to police the affiliation. A union could simply decide not to change its name upon affiliation, and would not have to ask the Board to amend its certification. The employer might then challenge the affiliation as a defense to an unfair labor practice charge. Unless the Board finds that the affiliation raised a question of representation, the affiliated union would continue as the employees' bargaining representative, and the employer would be required to bargain with the reorganized union. Thus, the amended certification procedure cannot broaden the Board's authority to interfere in the union's affairs.

Board's own election and certification procedures," *Amoco Production Co.*, 262 N. L. R. B., at 1241, it can refuse to consider the union's unfair labor practice charge, and is authorized to conduct a representation election. However, it may not condone an employer's refusal to bargain in the absence of a question of representation, and has no authority to prescribe internal procedures for the union to follow in order to invoke the Act's protections.

IV

The basic purpose of the National Labor Relations Act is to preserve industrial peace. 29 U. S. C. § 151. The Act includes several provisions designed to encourage stable bargaining relationships, *e. g.* § 8(b)(7)(A), 29 U. S. C. § 158 (b)(7)(A) (prohibiting recognitional picketing by employees represented by recognized union); § 8(b)(7)(B), 29 U. S. C. § 158(b)(7)(B) (prohibiting recognitional picketing for one year after election); § 9(c)(3), 29 U. S. C. § 159(c)(3) (prohibiting second representation election within one year), and the Board has devised rules to achieve the same ends. See n. 3, *supra.* Petitioners argue that the Board's new rule furthers this policy by introducing a measure of certainty into the bargaining relationship that protects both the employer and the union. By having all employees vote for affiliation, so the argument goes, the employer avoids the possibility of having to bargain with a union that may not represent a majority of the employees. Petitioners submit that the union also benefits from having all employees vote, since it avoids the disruption that would occur if the Board eventually determines that it must hold a new election because the affiliation raises a question of representation. If the employees vote for affiliation, the union can continue to bargain with confidence, since the employer is less likely to challenge the affiliation, and Board is less likely to find a question of representation. If the employees vote against affliation, the incumbent union can forgo affiliation and continue to represent the bargaining unit.

Absent any statutory framework, the Board's rule might well be a rational means of preserving industrial stability. However, as the Ninth Circuit noted, Congress has already determined "as a matter of national labor policy that bargaining stability and the principle of majority rule may limit the timing of employee challenges to their certified bargaining representative's majority status." 752 F. 2d at 366. The Act assumes that stable bargaining relationships are best maintained by allowing an affiliated union to continue representing a bargaining unit unless the Board finds that the affiliation raises a question of representation. The Board's rule contravenes this assumption, since an employer may invoke a perceived procedural defect to cease bargaining even though the union succeeds the organization the employees chose, the employees have made no effort to decertify the union, and the employer presents no evidence to challenge the union's majority status. Any uncertainty on the employer's part does not relieve him of his obligation to bargain collectively. "If an employer has doubts about his duty to continue bargaining, it is his responsibility to petition the Board for relief . . . . To allow employers to rely on employees' rights in refusing to bargain with the formally designated union is not conducive to [industrial peace]." *Brooks* v. *NLRB*, 348 U. S. 96, 103 (1954). The Board's rule effectively gives the employer the power to veto an independent union's decision to affiliate, thereby allowing the employer to directly interfere with union decision-making congress intended to insulate from outside interference.

We hold that the Board exceeded its authority under the Act in requiring that nonunion employees be allowed to vote for affiliation before it would order the employer to bargain with the affiliated union.[13] The judgment of the Court of

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[13] We do not suggest, however, that other Board representation procedures, such as its continuity determination, exceed its statutory authority.

Appeals is affirmed. The case is remanded for further proceedings consistent with this opinion.

It is so ordered.

Respondent argues that the Board's rule is irrational because it assumes that affiliation involves the selection of a new bargaining representative absent any indication that the affiliation has significantly changed the union. Because we conclude that the Board has exceeded its authority under the statute, we need not address this issue.

SUPREME COURT OF THE UNITED STATES

Nos. 84–1493 AND 84–1509

NATIONAL LABOR RELATIONS BOARD,
PETITIONER
84–1493 *v.*
FINANCIAL INSTITUTION EMPLOYEES OF AMERICA, LOCAL 1182, CHARTERED BY UNITED
FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION, AFL–CIO ET AL.

SEATTLE-FIRST NATIONAL BANK, PETITIONER
84–1509 *v.*
FINANCIAL INSTITUTION EMPLOYEES OF
AMERICA, ETC., ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

[February 26, 1986]

CHIEF JUSTICE BURGER, concurring in the judgment.

I write separately to note that the Court's action today striking down a Board action is one of those rare departures from this Court's long history of special deference to the Board's decisions concerning the selection of an exclusive bargaining unit representative by employees. See *e. g.*, *NLRB* v. *A. J. Tower Co.*, 329 U. S. 324, 330 (1946); see also *NLRB* v. *Action Automotive, Inc.*, —— U. S. —— (1985).

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(Slip Opinion)

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Lumber Co.*, 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

447
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ORIGINAL

Syllabus

MICHIGAN *v.* JACKSON

CERTIORARI TO THE SUPREME COURT OF MICHIGAN

No. 84–1531. Argued December 9, 1985—Decided April 1, 1986*

Respondents, at separate arraignments in a Michigan trial court on unrelated murder charges, each requested appointment of counsel. But before respondents had an opportunity to consult with counsel, police officers, after advising respondents of their *Miranda* rights, questioned them and obtained confessions. Both respondents were convicted over objections to the admission of the confessions in evidence. The Michigan Court of Appeals reversed and remanded in one case, but affirmed in the other. The Michigan Supreme Court considered both cases together, and held that the confessions were improperly obtained in violation of the Sixth Amendment.

Held: The confessions should have been suppressed. Although the rule of *Edwards* v. *Arizona*, 451 U. S. 477, that once a suspect has invoked his right to counsel, police may not initiate interrogation until counsel has been made available to the suspect, rested on the Fifth Amendment and concerned a request for counsel made during custodial interrogation, the reasoning of that case applies with even greater force to these cases. The assertion of the right to counsel is no less significant, and the need for additional safeguards no less clear, when that assertion is made at an arraignment and when the basis for it is the Sixth Amendment. If police initiate an interrogation after a defendant's assertion of his right to counsel at an arraignment or similar proceeding, as in these cases, any waiver of that right for that police-initiated interrogation is invalid. Pp. 4–11.

421 Mich. 39, 365 N. W. 2d 56, affirmed.

STEVENS, J., delivered the opinion of the Court in which BRENNAN, WHITE, MARSHALL, and BLACKMUN, JJ., joined. BURGER, C. J., filed an

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*Together with No. 84–1539, *Michigan* v. *Bladel*, also on certiorari to the same court.

opinion concurring in the judgment. REHNQUIST, J., filed a dissenting opinion, in which POWELL and O'CONNOR, JJ., joined.

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D. C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

Nos. 84-1531 AND 84-1539

MICHIGAN, PETITIONER
84-1531 *v.*
ROBERT BERNARD JACKSON

MICHIGAN, PETITIONER
84-1539 *v.*
RUDY BLADEL

ON WRITS OF CERTIORARI TO THE SUPREME COURT OF MICHIGAN

[April 1, 1986]

JUSTICE STEVENS delivered the opinion of the Court.

In *Edwards* v. *Arizona*, 451 U. S. 477 (1981), we held that an accused person in custody who has "expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police." *Id.*, at 484–485. In *Solem* v. *Stumes*, 465 U. S. 638 (1984), we reiterated that "*Edwards* established a bright-line rule to safeguard pre-existing rights," *id.*, at 646, "once a suspect has invoked the right to counsel, any subsequent conversation must be initiated by him." *Id.*, at 641.

The question presented by these two cases is whether the same rule applies to a defendant who has been formally charged with a crime and who has requested appointment of counsel at his arraignment. In both cases, the Michigan Supreme Court held that postarraignment confessions were improperly obtained—and the Sixth Amendment violated—because the defendants had "requested counsel during their arraignments, but were not afforded an opportunity to consult with counsel before the police initiated further interrogations." 421 Mich. 39, 67–68, 365 N. W. 2d 56, 69 (1984). We agree with that holding.

I

The relevant facts may be briefly stated. Respondent Bladel was convicted of the murder of three railroad employees at the Amtrak Station in Jackson, Michigan, on December 31, 1978. Bladel, a disgruntled former employee, was arrested on January 1, 1979, and, after being questioned on two occasions, was released on January 3. He was arrested again on March 22, 1979, and agreed to talk to the police that evening without counsel. On the following morning, Friday, March 23, 1979, Bladel was arraigned. He requested that counsel be appointed for him because he was indigent. The detective in charge of the Bladel investigation was present at the arraignment. A notice of appointment was promptly mailed to a law firm, but the law firm did not receive it until Tuesday, March 27. In the interim, on March 26, 1979, two police officers interviewed Bladel in the county jail and obtained a confession from him. Prior to that questioning, the officers properly advised Bladel of his *Miranda* rights.[1] Although he had inquired about his representation several times since the arraignment, Bladel was not told that a law firm had been appointed to represent him.

The trial court overruled Bladel's objection to the admissibility of all four statements. On appeal from his conviction and sentence, Bladel challenged only the postarraignment confession. The Michigan Court of Appeals first rejected that challenge and affirmed the conviction, 106 Mich. App.

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[1] See *Miranda* v. *Arizona*, 384 U. S. 436 (1966). The *Miranda* warnings were also given prior to the questioning on January 1, January 2, and March 22. Although Bladel made certain inculpatory statements on those occasions, he denied responsibility for the murder until after the arraignment. As the Michigan Supreme Court noted, even without his own statements, the evidence against Bladel was substantial. 421 Mich., at 44 and n. 2, 365 N. W. 2d, at 58–59, and n. 2.

397, 308 N. W. 2d 230 (1981), but, after reconsideration in the light of a recent decision by the State Supreme Court, it reversed and remanded for a new trial. 118 Mich. App. 498, 325 N. W. 2d 421 (1982). The Michigan Supreme Court then granted the prosecutor's application for leave to appeal and considered the case with respondent Jackson's appeal of his conviction. 421 Mich. 39, 365 N. W. 2d 56 (1984).

Respondent Jackson was convicted of second-degree murder and conspiracy to commit second-degree murder. He was one of four participants in a wife's plan to have her husband killed on July 12, 1979. Arrested on an unrelated charge on July 30, 1979, he made a series of six statements in response to police questioning prior to his arraignment at 4:30 p. m. on August 1. During the arraignment, Jackson requested that counsel be appointed for him. The police involved in his investigation were present at the arraignment. On the following morning, before he had an opportunity to consult with counsel, two police officers obtained another statement from Jackson to "confirm" that he was the person who had shot the victim. As was true of the six prearraignment statements, the questioning was preceded by advice of his *Miranda* rights and Jackson's agreement to proceed without counsel being present.

The Michigan Court of Appeals held that the seventh statement was properly received in evidence. 114 Mich. App. 649, 319 N. W. 2d 613 (1982). It distinguished *Edwards* on the ground that Jackson's request for an attorney had been made at his arraignment whereas Edwards' request had been made during a custodial interrogation by the police. Accordingly, it affirmed Jackson's conviction of murder, although it set aside the conspiracy conviction on unrelated grounds.

The Michigan Supreme Court held that the post-arraignment statements in both cases should have been suppressed. Noting that the Sixth Amendment right to counsel attached at the time of the arraignments, the court concluded that the *Edwards* rule "applies by analogy to those situations where an accused requests counsel before the arraigning magistrate. Once this request occurs, the police may not conduct further interrogations until counsel has been made available to the accused, unless the accused initiates further communications, exchanges, or conversations with the police. . . . The police cannot simply ignore a defendant's unequivocal request for counsel." 421 Mich., at 66–67, 365 N. W. 2d, at 68–69 (footnote omitted). We granted certiorari, 471 U. S. —— (1985), and we now affirm.[2]

II

The question is not whether respondents had a right to counsel at their postarraignment, custodial interrogations. The existence of that right is clear. It has two sources. The Fifth Amendment protection against compelled self-incrimination provides the right to counsel at custodial interrogations. *Edwards*, 451 U. S., at 482; *Miranda* v. *Arizona*, 384 U. S. 436, 470 (1966). The Sixth Amendment guarantee of the assistance of counsel also provides the right to counsel at postarraignment interrogations. The arraignment signals "the initiation of adversary judicial proceedings" and thus the attachment of the Sixth Amendment, *United States* v. *Gouveia*, 467 U. S. 180, 187, 188 (1984);[3] thereafter, government efforts to elicit information from the accused, including interrogation, represent "critical stages" at which the Sixth Amendment applies. *Maine* v. *Moulton*, 474 U. S. —— (1985); *United States* v. *Henry*, 447 U. S. 264 (1980); *Brewer* v. *Williams*, 430 U. S. 387 (1977); *Massiah* v. *United States*, 377 U. S. 201 (1964). The question in these cases is whether respondents validly waived their right to counsel at the postarraignment custodial interrogations.

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[2] Respondent Jackson points out that the Michigan Supreme Court also held that his fourth, fifth, and sixth statements should have been suppressed on grounds of prearraignment delay under a state statute. He therefore argues that the decision rests on an adequate and independent state ground and that the writ of certiorari should be dismissed. The state court opinion, however, does not apply that prearraignment delay holding to the seventh statement. Thus, although the Michigan court's holding on the other statements does mean that Jackson's conviction must be reversed regardless of this Court's decision, the admissibility of the seventh statement is controlled by that court's Sixth Amendment analysis, and is properly before us.

[3] In *Jackson*, the State concedes that the arraignment represented the initiation of formal legal proceedings, and that the Sixth Amendment attached at that point. Brief for Petitioner in No. 84–1531, p. 10. In *Bladel*, however, the State disputes that contention, Brief for Petitioner in

In *Edwards*, the request for counsel was made to the police during custodial interrogation, and the basis for the Court's holding was the Fifth Amendment privilege against compelled self-incrimination. The Court noted the relevance of various Sixth Amendment precedents, 451 U. S., at 484, n. 8, but found it unnecessary to rely on the possible applicability of the Sixth Amendment. *Id.*, at 480, n. 7. In these cases, the request for counsel was made to a judge during arraignment, and the basis for the Michigan Supreme Court opinion was the Sixth Amendment's guarantee of the assistance of counsel.[4] The State argues that the *Edwards* rule

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No. 84–1539, pp. 24–26. In view of the clear language in our decisions about the significance of arraignment, the State's argument is untenable. See, *e. g.*, *Brewer* v. *Williams*, 430 U. S. 387, 398 (1977) ("a person is entitled to the help of a lawyer at or after the time that judicial proceedings have been initiated against him—'whether by way of formal charge, preliminary hearing, indictment, information *or arraignment*'") (emphasis added), quoting *Kirby* v. *Illinois*, 406 U. S. 682, 689 (1972) (plurality opinion). See also *United States* v. *Gouveia*, 467 U. S., at —— (quoting *Kirby*); *Estelle* v. *Smith*, 451 U. S. 454, 469–470 (1981) (quoting *Kirby*); *Moore* v. *Illinois*, 434 U. S. 220, 226 (1977) (quoting *Kirby*). Cf. *Powell* v. *Alabama*, 287 U. S. 45, 57 (1932) ("the most critical period of the proceedings against these defendants" was "*from the time of their arraignment* until the beginning of their trial") (emphasis added). The question whether arraignment signals the initiation of adversary judicial proceedings, moreover, is distinct from the question whether the arraignment itself is a critical stage requiring the presence of counsel, absent a valid waiver. Cf. *Hamilton* v. *Alabama*, 368 U. S. 52 (1961) (Alabama arraignment is a "critical stage").

[4] The Michigan Supreme Court found that "defendants' request to the

should not apply to these circumstances because there are legal differences in the basis for the claims; because there are factual differences in the contexts of the claims; and because respondents signed valid waivers of their right to counsel at the postarraignment custodial interrogations. We consider these contentions in turn.

The State contends that differences in the legal principles underlying the Fifth and Sixth Amendments compel the conclusion that the *Edwards* rule should not apply to a Sixth Amendment claim. *Edwards* flows from the Fifth Amendment's right to counsel at custodial interrogations, the State argues; its relevance to the Sixth Amendment's provision of the assistance of counsel is far less clear, and thus the *Edwards* principle for assessing waivers is unnecessary and inappropriate.

In our opinion, however, the reasons for prohibiting the interrogation of an uncounseled prisoner who has asked for the help of a lawyer are even stronger after he has been formally charged with an offense than before. The State's argument misapprehends the nature of the pretrial protections afforded by the Sixth Amendment. In *United States* v. *Gouveia*, we explained the significance of the formal accusation, and the corresponding attachment of the Sixth Amendment right to counsel:

> "[G]iven the plain language of the Amendment and its purpose of protecting the unaided layman at critical confrontations with his adversary, our conclusion that the right to counsel attaches at the initiation of adversary judicial criminal proceedings 'is far from a mere formalism.' *Kirby* v. *Illinois*, 406 U. S., at 689. It is only at

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arraigning magistrate for appointment of counsel implicated only their Sixth Amendment right to counsel," 421 Mich., at 52, 365 N. W. 2d, at 62, because the request was not made during custodial interrogation. It was for that reason that the Michigan court did not rely on a Fifth Amendment *Edwards* analysis. We express no comment on the validity of the Michigan court's Fifth Amendment analysis.

> that time 'that the government has committed itself to prosecute, and only then that the adverse positions of government and defendant have solidified. It is then that a defendant finds himself faced with the prosecutorial forces of organized society, and immersed in the intricacies of substantive and procedural criminal law.'" 467 U. S., at 189.

As a result, the "Sixth Amendment guarantees the accused, at least after the initiation of formal charges, the right to rely on counsel as a 'medium' between him and the State." *Maine* v. *Moulton*, 474 U. S., at ——. Thus, the Sixth Amendment right to counsel at a post-arraignment interrogation requires at least as much protection as the Fifth Amendment right to counsel at any custodial interrogation.

Indeed, after a formal accusation has been made—and a person who had previously been just a "suspect" has become an "accused" within the meaning of the Sixth Amendment—the constitutional right to the assistance of counsel is of such importance that the police may no longer employ techniques for eliciting information from an uncounseled defendant that might have been entirely proper at an earlier stage of their investigation. Thus, the surreptitious employment of a cellmate, see *United States* v. *Henry*, 447 U. S. 264 (1980), or the electronic surveillance of conversations with third parties, see *Maine* v. *Moulton*, *supra*; *Massiah* v. *United States*, 377 U. S. 201 (1964), may violate the defendant's Sixth Amendment right to counsel even though the same methods of investigation might have been permissible before arraignment or indictment.[6] Far from undermining the *Edwards* rule, the difference between the legal basis for the rule applied in *Edwards* and the Sixth Amendment claim asserted in these cases actually provides additional support for the application of the rule in these circumstances.

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[6] Similarly, after the initiation of adversary judicial proceedings, the Sixth Amendment provides a right to counsel at a "critical stage" even when there is no interrogation and no Fifth Amendment applicability. See *United States* v. *Wade*, 388 U. S. 218 (1967) (Sixth Amendment provides right to counsel at postindictment line-up even though Fifth Amendment is not implicated).

The State also relies on the factual differences between a request for counsel during custodial interrogation and a request for counsel at an arraignment. The State maintains that respondents may not have actually intended their request for counsel to encompass representation during any further questioning by the police. This argument, however, must be considered against the backdrop of our standard for assessing waivers of constitutional rights. Almost a half century ago, in *Johnson* v. *Zerbst*, 304 U. S. 458 (1938), a case involving an alleged waiver of a defendant's Sixth Amendment right to counsel, the Court explained that we should "indulge every reasonable presumption against waiver of fundamental constitutional rights." *Id.*, at 464. For that reason, it is the State that has the burden of establishing a valid waiver. *Brewer* v. *Williams*, 430 U. S., at 404. Doubts must be resolved in favor of protecting the constitutional claim. This settled approach to questions of waiver requires us to give a broad, rather than a narrow, interpretation to a defendant's request for counsel—we presume that the defendant requests the lawyer's services at every critical stage of the prosecution.[6] We thus reject the State's suggestion that respondents' requests for the appointment of counsel should be construed to apply only to representation in formal legal proceedings.[7]

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[6] In construing respondents' request for counsel, we do not, of course, suggest that the right to counsel turns on such a request. See *Brewer* v. *Williams*, 430 U. S., at 404 ("the right to counsel does not depend upon a request by the defendant"); *Carnley* v. *Cochran*, 369 U. S. 506, 513 (1962) ("it is settled that where the assistance of counsel is a constitutional requisite, the right to be furnished counsel does not depend on a request"). Rather, we construe the defendant's request for counsel as an extremely important fact in considering the validity of a subsequent waiver in response to police-initiated interrogation.

[7] We also agree with the comments of the Michigan Supreme Court about the nature of an accused's request for counsel:

The State points to another factual difference: the police may not know of the defendant's request for attorney at the arraignment. That claimed distinction is similarly unavailing. In the cases at bar, in which the officers in charge of the investigations of respondents were present at the arraignments, the argument is particularly unconvincing. More generally, however, Sixth Amendment principles require that we impute the State's knowledge from one state actor to another. For the Sixth Amendment concerns the confrontation between the State and the individual.[8] One set of state actors (the police) may not claim ignorance of defendants' unequivocal request for counsel to another state actor (the court).

The State also argues that, because of these factual differences, the application of *Edwards* in a Sixth Amendment context will generate confusion. However, we have frequently emphasized that one of the characteristics of *Edwards* is its clear, "bright line" quality. See, *e. g.*, *Smith* v. *Illinois*, 469 U. S. —, — (1984); *Solem* v. *Stumes*, 465 U. S., at 646; *Oregon* v. *Bradshaw*, 462 U. S. 1039, 1044 (1983) (plurality

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"Although judges and lawyers may understand and appreciate the subtle distinctions between the Fifth and Sixth Amendment rights to counsel, the average person does not. When an accused requests an attorney, either before a police officer or a magistrate, he does not know which constitutional right he is invoking; he therefore should not be expected to articulate exactly why or for what purposes he is seeking counsel. It makes little sense to afford relief from further interrogation to a defendant who asks a police officer for an attorney, but permit further interrogation to a defendant who makes an identical request to a judge. The simple fact that defendant has requested an attorney indicates that he does not believe that he is sufficiently capable of dealing with his adversaries singlehandedly." 421 Mich., at 63–64, 365 N. W. 2d, at 67.

[8] See, *e. g.*, *Maine* v. *Moulton*, 474 U. S. —, — (1985):

"Once the right to counsel has attached and been asserted, *the State* must of course honor it. This means more than simply that *the State* cannot prevent the accused from obtaining the assistance of counsel. The Sixth Amendment also imposes on *the State* an affirmative obligation to respect and preserve the accused's choice to seek this assistance." (emphasis added) (footnote omitted).

opinion); *id.*, at 1054, n. 2 (MARSHALL, J., dissenting). We do not agree that applying the rule when the accused requests counsel at an arraignment, rather than in the police station, somehow diminishes that clarity. To the extent that there may have been any doubts about interpreting a request for counsel at an arraignment, or about the police responsibility to know of and respond to such a request, our opinion today resolves them.

Finally, the State maintains that each of the respondents made a valid waiver of his Sixth Amendment rights by signing a postarraignment confession after again being advised of his constitutional rights. In *Edwards*, however, we rejected the notion that, after a suspect's request for counsel, advice of rights and acquiescence in police-initiated questioning could establish a valid waiver. 451 U. S., at 484. We find no warrant for a different view under a Sixth Amendment analysis. Indeed, our rejection of the comparable argument in *Edwards* was based, in part, on our review of earlier Sixth Amendment cases.[9] Just as written waivers are insufficient to justify police-initiated interrogations after the request for counsel in a Fifth Amendment analysis, so too they are insufficient to justify police-initiated interrogations after the request for counsel in a Sixth Amendment analysis.[10]

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[9] After stating our holding that "when an accused has invoked his right to have counsel present during custodial interrogation, a valid waiver of that right cannot be established by showing only that he responded to further police-initiated custodial interrogation even if he has been advised of his rights," 451 U. S., at 484, we appended this footnote:

"In *Brewer* v. *Williams*, 430 U. S. 387 (1977), where, as in *Massiah* v. *United States*, 377 U. S. 201 (1964), the Sixth Amendment right to counsel had accrued, the Court held that a valid waiver of counsel rights should not be inferred from the mere response by the accused to overt or more subtle forms of interrogation or other efforts to elicit incriminating infromation. In *Massiah* and *Brewer*, counsel had been engaged or appointed and the admissions in question were elicited in his absence. But in *McLeod* v. *Ohio*, 381 U. S. 356 (1965), we summarily reversed a decision that the police could elicit information after indictment even though counsel had not yet been appointed." *Id.*, at 484, n. 8.

III

Edwards is grounded in the understanding that "the assertion of the right to counsel [is] a significant event," 451 U. S., at 485, and that "additional safeguards are necessary when the accused asks for counsel." *Id.*, at 484. We conclude that the assertion is no less significant, and the need for additional safeguards no less clear, when the request for counsel is made at an arraignment and when the basis for the claim is the Sixth Amendment. We thus hold that, if police initiate interrogation after a defendant's assertion, at an arraignment or similar proceeding, of his right to counsel, any waiver of the defendant's right to counsel for that police-initiated interrogation is invalid.

Although the *Edwards* decision itself rested on the Fifth Amendment and concerned a request for counsel made during custodial interrogation, the Michigan Supreme Court correctly perceived that the reasoning of that case applies with even greater force to these cases. The judgments are accordingly affirmed.

It is so ordered.

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[10] The State also argues that the Michigan Supreme Court's finding of a valid Fifth Amendment waiver should require the finding of a valid Sixth Amendment waiver. The relationship between the validity of waivers for Fifth and Sixth Amendment purposes has been the subject of considerable attention in the courts, 421 Mich., at 55–62, 365 N. W. 2d, at 63–67 (discussing and collecting cases), and the commentaries, *id.*, at 54, n. 15, 365 N. W. 2d, at 63, n. 15. In view of our holding that the *Edwards* rule applies to the Sixth Amendment and that the Sixth Amendment requires the suppression of the postarraignment statements, we need not decide either the validity of the Fifth Amendment waiver in this case, see n. 4, *supra*, or the general relationship between Fifth and Sixth Amendment waivers.

SUPREME COURT OF THE UNITED STATES

Nos. 84-1531 AND 84-1539

84-1531 MICHIGAN, PETITIONER
v.
ROBERT BERNARD JACKSON

84-1539 MICHIGAN, PETITIONER
v.
RUDY BLADEL

ON WRITS OF CERTIORARI TO THE SUPREME COURT OF MICHIGAN

[April 1, 1986]

CHIEF JUSTICE BURGER, concurring in the judgment.

I concurred only in the judgment in *Edwards* v. *Arizona*, 451 U. S. 477, 487-488 (1981), and in doing so I observed that:

> "The extraordinary protections afforded a person in custody suspected of criminal conduct are not without a valid basis, but as with all 'good' things they can be carried too far."

The urge for "bright-line" rules readily applicable to a host of varying situations would likely relieve this Court somewhat from more than a doubling of the Court's work in recent decades, but this urge seems to be leading the Court to an absolutist, mechanical treatment of the subject. At times, it seems, the judicial mind is in conflict with what behavioral—and theological—specialists have long recognized as a natural human urge of people to confess wrongdoing. See, *e. g.*, T. Reik, The Compulsion to Confess (1959).

We must, of course, protect persons in custody from coercion, but step by step we have carried this concept well beyond sound, common-sense boundaries. The Court's treatment of this subject is an example of the infirmity of trying to perform the rulemaking function on a case-by-case basis, ignoring the reality that the criminal cases coming to this Court, far from typical, are the "hard" cases. This invokes the ancient axiom that hard cases can make bad law.

Stare decisis calls for my following the rule of *Edwards* in this context, but plainly the subject calls for re-examination. Increasingly, to borrow from Justice Cardozo, more and more "criminal[s] . . . go free because the constable has blundered." *People* v. *Defore*, 242 N. Y. 13, 21, 150 N. E. 585, 587 (1926).

SUPREME COURT OF THE UNITED STATES

Nos. 84–1531 AND 84–1539

MICHIGAN, PETITIONER
84–1531 *v.*
ROBERT BERNARD JACKSON

MICHIGAN, PETITIONER
84–1539 *v.*
RUDY BLADEL

ON WRITS OF CERTIORARI TO THE SUPREME COURT
OF MICHIGAN

[April 1, 1986]

JUSTICE REHNQUIST, with whom JUSTICE POWELL and JUSTICE O'CONNOR join, dissenting.

The Court's decision today rests on the following deceptively simple line of reasoning: *Edwards* v. *Arizona*, 451 U. S. 477 (1981), created a bright-line rule to protect a defendant's Fifth Amendment rights; Sixth Amendment rights are even more important than Fifth Amendment rights; therefore, we must also apply the *Edwards* rule to the Sixth Amendment. The Court prefers this neat syllogism to an effort to discuss or answer the only relevant question: Does the *Edwards* rule make sense in the context of the Sixth Amendment? I think it does not, and I therefore dissent from the Court's unjustified extension of the *Edwards* rule to the Sixth Amendment.

My disagreement with the Court stems from our differing understandings of *Edwards*. In *Edwards*, this Court held that once a defendant has invoked his right under *Miranda* v. *Arizona*, 384 U. S. 436 (1966), to have counsel present during custodial interrogation, "a valid waiver of that right cannot be established by showing only that he responded to further police-initiated custodial interrogation even if he has been advised of his rights." 451 U. S., at 484. This "prophylactic rule," see *Solem* v. *Stumes*, 465 U. S. 638, 644, 645 (1984), was deemed necessary to prevent the police from effectively "overriding" a defendant's assertion of his *Miranda* rights by "badgering" him into waiving those rights. See *Oregon* v. *Bradshaw*, 462 U. S. 1039, 1044 (1983) (plurality opinion of REHNQUIST, J.) (*Edwards* rule "designed to protect an accused in police custody from being badgered by police officers").[1] In short, as we explained in later cases, "*Edwards* did not confer a substantive constitutional right that had not existed before; it 'created a protective umbrella serving to enhance a constitutional guarantee.'" *Solem* v. *Stumes*, *supra*, at 644, n. 4, quoting *Michigan* v. *Payne*, 412 U. S. 47, 54 (1973); see also *Shea* v. *Louisiana*, 470 U. S. ——, —— (1985) (WHITE, J., dissenting) (describing "prophylactic purpose" of *Edwards* rule).

What the Court today either forgets or chooses to ignore is that the "constitutional guarantee" referred to in *Solem* v. *Stumes* is the Fifth Amendment's prohibition on compelled self-incrimination. This prohibition, of course, is also the constitutional underpinning for the set of prophylactic rules announced in *Miranda* itself. See *Moran* v. *Burbine*, 475 U. S. ——, —— (1986); *Oregon* v. *Elstad*, 470 U. S. ——, —— (1985).[2] *Edwards*, like *Miranda*, imposes on the police a bright-line standard of conduct intended to help ensure that confessions obtained through custodial interrogation will not be "coerced" or "involuntary." Seen in this proper light, *Edwards* provides nothing more than a second layer of protection, in addition to those rights conferred by *Miranda*, for a defendant who might otherwise be compelled by the police to incriminate himself in violation of the Fifth Amendment.

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[1] The four dissenters in *Oregon* v. *Bradshaw* apparently agreed with the plurality's characterization of the *Edwards* rule. See 462 U. S., at 1055, n. 2 (MARSHALL, J., joined by BRENNAN, BLACKMUN, and STEVENS, JJ., dissenting) (citing passage from plurality opinion quoted in the text, and noting that "[t]he only dispute between the plurality and the dissent in this case concerns the meaning of 'initiation' for purposes of *Edwards' per se* rule").

[2] The Court suggests, in dictum, that the Fifth Amendment also provides defendants with a "right to counsel." See *ante*, at 4. But our cases make clear that the Fifth Amendment itself provides no such "right." See *Moran* v. *Burbine*, 475 U. S., at ——, n. 1; *Oregon* v. *Elstad*, 470 U. S., at ——. Instead, *Miranda* confers upon a defendant a "right to counsel," *but*

The dispositive question in the instant case, and the question the Court should address in its opinion, is whether the same kind of prophylactic rule is needed to protect a defendant's right to counsel under the Sixth Amendment. The answer to this question, it seems to me, is clearly "no." The Court does not even suggest that the police commonly deny defendants their Sixth Amendment right to counsel. Nor, I suspect, would such a claim likely be borne out by empirical evidence. Thus, the justification for the prophylactic rules this Court created in *Miranda* and *Edwards*, namely, the perceived widespread problem that the police were violating, and would probably continue to violate, the Fifth Amendment rights of defendants during the course of custodial interrogations, see *Miranda*, *supra*, at 445–458,[3] is conspicuously absent in the Sixth Amendment context. To put it simply, the prophylactic rule set forth in *Edwards* makes no

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only when such counsel is requested during custodial interrogations. Even under *Miranda*, the "right to counsel" exists solely as a means of protecting the defendant's Fifth Amendment right not to be compelled to incriminate himself.

[3] In *Miranda*, this Court reviewed numerous instances in which police brutality had been used to coerce a defendant into confessing his guilt. The Court then stated:

"The use of physical brutality and violence is not, unfortunately, relegated to the past or to any part of the country. . . .

"The examples given above are undoubtedly the exception now, but they are sufficiently widespread to be the object of concern. Unless a proper limitation upon custodial interrogation is achieved . . . there can be no assurance that practices of this nature will be eradicated in the foreseeable future." 384 U. S., at 446–447.

sense at all except when linked to the Fifth Amendment's prohibition against compelled self-incrimination.

Not only does the Court today cut the *Edwards* rule loose from its analytical moorings, it does so in a manner that graphically reveals the illogic of the Court's position. The Court phrases the question presented in this case as whether the *Edwards* rule applies "to a defendant who has been formally charged with a crime *and who has requested appointment of counsel at his arraignment.*" *Ante*, at 1 (emphasis added). And the Court ultimately limits its holding to those situations where the police "initiate interrogation *after a defendant's assertion, at an arraignment or similar proceeding, of his right to counsel.*" *Ante*, at 11 (emphasis added).

In other words, the Court most assuredly does *not* hold that the *Edwards per se* rule prohibiting all police-initiated interrogations applies from the moment the defendant's Sixth Amendment right to counsel attaches, with or without a request for counsel by the defendant. Such a holding would represent, after all, a shockingly dramatic restructuring of the balance this Court has traditionally struck between the rights of the defendant and those of the larger society. Applying the *Edwards* rule to situations in which a defendant has not made an explicit request for counsel would also render completely nugatory the extensive discussion of "waiver" in such prior Sixth Amendment cases as *Brewer* v. *Williams*, 430 U. S. 387, 401–406 (1977). See also *id.*, at 410 (POWELL, J., concurring) ("The critical factual issue is whether there had been a voluntary waiver"); *id.*, at 417 (BURGER, C. J., dissenting) ("[I]t is very clear that Williams had made a valid waiver of his . . . Sixth Amendment right to counsel); *id.*, at 430, n. 1 (WHITE, J., joined by BLACKMUN and REHNQUIST, JJ., dissenting) ("It does not matter whether the right not to make statements in the absence of counsel stems from *Massiah* v. *United States*, 377 U. S. 201 (1964), or *Miranda*

v. *Arizona*, 384 U. S. 436 (1966). In either case the question is one of waiver").[4]

This leaves the Court, however, in an analytical straitjacket. The problem with the limitation the Court places on the Sixth Amendment version of the *Edwards* rule is that, unlike a defendant's "right to counsel" under *Miranda*, which does not arise until affirmatively invoked by the defendant during custodial interrogation, a defendant's Sixth Amendment right to counsel does not depend at all on whether the defendant has requested counsel. See *Brewer* v. *Williams*, *supra*, at 404; *Carnley* v. *Cochran*, 369 U. S. 506, 513 (1962). The Court acknowledges as much in footnote six of its opinion, where it stresses that "we do not, of course, suggest that the right to counsel turns on . . . a request [for counsel]." *Ante*, at 8, n. 6.

The Court provides no satisfactory explanation for its decision to extend the *Edwards* rule to the Sixth Amendment, yet limit that rule to those defendants foresighted enough, or just plain lucky enough, to have made an explicit request for counsel which we have always understood to be completely unnecessary for Sixth Amendment purposes. The Court attempts to justify its emphasis on the otherwise legally insignificant request for counsel by stating that "we construe the defendant's request for counsel as an extremely important fact in considering the validity of a subsequent waiver in response to police-initiated interrogation." *Ibid.* This statement sounds reasonable, but it is flatly inconsistent with the remainder of the Court's opinion, in which the Court holds that there can be no waiver of the Sixth Amendment right to counsel after a request for counsel has been made. See *ante*, at 11, n. 10. It is obvious that, for the Court, the defendant's request for counsel is not merely an "extremely important fact"; rather, it is the *only* fact that counts.

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[4] See also *Moran* v. *Burbine*, 475 U. S., at —— (1986) ("It is clear, of course, that, *absent a valid waiver*, the defendant has the right to the presence of an attorney during any interrogation occurring after the first formal charging proceeding, the point at which the Sixth Amendment right to counsel initially attaches").

Several of our Sixth Amendment cases have indeed erected virtually *per se* barriers against certain kinds of police conduct. See, *e. g.*, *Maine* v. *Moulton*, 474 U. S. —— (1985); *United States* v. *Henry*, 447 U. S. 264 (1980); *Massiah* v. *United States*, 377 U. S. 201 (1964). These cases, however, all share one fundamental characteristic that separates them from the instant case; in each case, the nature of the police conduct was such that it would have been impossible to find a valid waiver of the defendant's Sixth Amendment right to counsel. See *Maine* v. *Moulton*, *supra*, at —— (undisclosed electronic surveillance of conversations with a third party); *United States* v. *Henry*, *supra*, at 265, 273 (use of undisclosed police informant); *Massiah* v. *United States*, *supra*, at 202 (undisclosed electronic surveillance). Here, on the other hand, the conduct of the police was totally open and above-board, and could not be said to prevent the defendant from executing a valid Sixth Amendment waiver under the standards set forth in *Johnson* v. *Zerbst*, 304 U. S. 458 (1938).

The truth is that there is no satisfactory explanation for the position the Court adopts in this case. The glaring inconsistencies in the Court's opinion arise precisely because the Court lacks a coherent, analytically sound basis for its decision. The prophylactic rule of *Edwards*, designed from its inception to protect a defendant's right under the Fifth Amendment not to be compelled to incriminate himself, simply does not meaningfully apply to the Sixth Amendment. I would hold that *Edwards* has no application outside the context of the Fifth Amendment, and would therefore reverse the judgment of the court below.

JU6.8/b:985/84-1538

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(Slip Opinion)

1985

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Lumber Co.*, 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

IES 372

Syllabus

FISHER ET AL. *v.* CITY OF BERKELEY, CALIFORNIA, ET AL.

ORIGINAL

APPEAL FROM THE SUPREME COURT OF CALIFORNIA

No. 84-1538. Argued November 12, 1985—Decided February 26, 1986

A Berkeley, California, ordinance, enacted pursuant to popular initiative, imposes rent ceilings on residential real property in the city. The rent ceilings are under the control of a Rent Stabilization Board. Appellant landlords brought suit in California Superior Court challenging the constitutionality of the ordinance on Fourteenth Amendment grounds and seeking declaratory and injunctive relief. The Superior Court upheld the ordinance but was reversed by the California Court of Appeal. In the meantime, based on the intervening decision in *Community Communications Co.* v. *Boulder*, 455 U. S. 40, the question arose as to whether the ordinance was unconstitutional because it was pre-empted by the Sherman Act. The California Supreme Court held that there was no conflict between the ordinance and the Sherman Act.

Held: The ordinance is not unconstitutional as being pre-empted by the Sherman Act. Pp. 4-10.

(a) The rent ceilings established by the ordinance and maintained by the Rent Stabilization Board were unilaterally imposed by the city upon landlords to the exclusion of private control. Thus, the rent ceilings lack the element of concerted action needed before they can be characterized as a *per se* violation of § 1 of the Sherman Act. A restraint imposed unilaterally by government does not become concerted action within the meaning of § 1 simply because it has a coercive effect upon parties who must obey the law. And the mere fact that all competing landlords must comply with the ordinance is not enough to establish a conspiracy among landlords. Pp. 5-7.

(b) While the ordinance gives tenants some power to trigger its enforcement, it places complete control over maximum rent levels exclusively in the Rent Stabilization Board's hands. *Schwegmann Bros.* v. *Calvert Distillers Corp.*, 341 U. S. 384, and *California Retail Liquor*

Syllabus

Dealers Assn. v. *Midcal Aluminum, Inc.*, 445 U. S. 97, distinguished. Pp. 7–9.

37 Cal. 3d 644, 693 P. 2d 261, affirmed.

Marshall, J., delivered the opinion of the Court, in which **Burger**, C. J., and **White**, **Blackmun**, **Rehnquist**, **Stevens**, and **O'Connor**, JJ., joined. **Powell**, J., filed an opinion concurring in the judgment. **Brennan**, J., filed a dissenting opinion.

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D. C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

No. 84-1538

ALEXANDRA FISHER, ET AL., APPELLANTS *v.* CITY OF BERKELEY, CALIFORNIA, ET AL.

ON APPEAL FROM THE SUPREME COURT OF CALIFORNIA

[February 26, 1986]

JUSTICE MARSHALL delivered the opinion of the Court.

The question presented here is whether a rent control ordinance enacted by a municipality pursuant to popular initiative is unconstitutional because pre-empted by the Sherman Act.

I

In June 1980, the electorate of the City of Berkeley, California, enacted an initiative entitled "Ordinance 5261-N. S., Rent Stabilization and Eviction for Good Cause Ordinance," (Hereafter Ordinance). Section 3 of the Ordinance stated the measure's purpose:[1]

> "The purposes of this Ordinance are to regulate residential rent increases in the City of Berkeley and to protect tenants from unwarranted rent increases and arbitrary, discriminatory, or retaliatory evictions, in order to help maintain the diversity of the Berkeley community and to ensure compliance with legal obligations relating to the rental of housing. This legislation is designed to address the City of Berkeley's housing crisis,

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[1] In 1982, while this case was pending in the California Court of Appeal, the Berkeley electorate enacted the "Tenants' Rights Amendments Act of 1982," revising certain sections of the 1980 Ordinance. Like the California Supreme Court, we review the Ordinance as amended, see 37 Cal. 3d 644, 654, n. 2, 693 P. 2d 261, 270, n. 2 (1984); all reference herein will therefore be to the 1982 version of the Ordinance.

> preserve the public peace, health and safety, and advance the housing policies of the City with regard to low and fixed income persons, minorities, students, handicapped, and the aged." App. to Juris. Statement A-111.

To accomplish these goals, the Ordinance places strict rent controls on all real property that "is being rented or is available for rent for residential use in whole or in part," § 5, *id.*, at A-113. Excepted are government-owned units, transient units, cooperatives, hospitals, certain small owner-occupied buildings, and all newly constructed buildings. For the remaining units, numbering approximately 23,000, 37 Cal. 3d 644, 678, 693 P. 2d 261, 288 (1985), the Ordinance establishes a base rent ceiling reflecting the rents in effect at the end of May 1980. A landlord may raise his rents from these levels only pursuant to an annual general adjustment of rent ceilings by a Rent Stabilization Board of appointed commissioners or after he is successful in petitioning the Board for an individual adjustment. A landlord who fails to register with the Board units covered by the Ordinance or who fails to adhere to the maximum allowable rent set under the Ordinance may be fined by the Board, sued by his tenants, or have rent legally withheld from him. If his violations are willful, he may face criminal penalties.

Shortly after the passage of the initiative, appellants, a group of landlords owning rental property in Berkeley, brought this suit in California Superior Court, claiming, *inter alia*, that the Ordinance violates their rights under the Due Process and Equal Protection Clauses of the Fourteenth Amendment, and seeking declaratory and injunctive relief. The Superior Court upheld the Ordinance on its face, but was reversed by the Court of Appeal. While that appeal was pending, however, this Court's decision in *Community Communications Co.* v. *City of Boulder*, 455 U. S. 40 (1982), led certain *amici* to raise the question whether the Ordinance was unconstitutional because pre-empted by the federal antitrust laws. When the California Supreme Court heard the appeal from the Court of Appeal's decision, it therefore chose to consider plaintiffs' pre-emption claim along with their Fourteenth Amendment challenge.

Although fully briefed on the question whether the Berkeley Ordinance constitutes state action exempt from antitrust scrutiny under the standard established in *Boulder, supra*, the California Supreme Court noted that consideration of this issue would become necessary only were there to be "'truly a conflict between the Sherman Act and the challenged regulatory scheme,'" 37 Cal. 3d, at 660, 693 P. 2d, at 275 (quoting *First American Title Co.* v. *South Dakota Land Title Assn.*, 714 F. 2d 1439, 1452 (CA8 1983), cert. denied, 464 U. S. 1042 (1984)). Such a conflict would exist, the Supreme Court concluded, only if the Ordinance on its face mandated conduct prohibited by either § 1 or § 2 of the Sherman Act. See *Rice* v. *Norman Williams Co.*, 458 U. S. 654, 661 (1982). After reviewing the two "traditional standards" that have consistently been used to determine whether conduct violates § 1 of the Sherman Act—the *per se* rules and the rule of reason, see *National Society of Professional Engineers* v. *United States*, 435 U. S. 679, 692 (1978), the court concluded that both standards, with their exclusive focus on competition and concern for the selfish motives of private actors, failed to give due deference to a municipality's legitimate interest in promoting public health, safety, and welfare. 37 Cal. 3d, at 667–673, 693 P. 2d, at 280–285. The Supreme Court therefore found both standards inappropriate and proceeded to apply a standard of its own devising, based upon this Court's Commerce Clause cases. Applying this test, the court found no conflict between the Rent Stabilization Ordinance and either § 1 or § 2 of the Sherman Act.

We noted probable jurisdiction limited to the antitrust preemption question, 471 U. S. —— (1985), and now affirm, although on grounds different from those relied on by the California Supreme Court. While that court was correct in noting that consideration of state action is not necessary unless an actual conflict with the antitrust laws is established, we find traditional antitrust analysis adequate to resolve the issue presented here.

II

We begin by noting that appellants make no claim under either § 4 or § 16 of the Clayton Act, 15 U. S. C. §§ 15 and 26, that the process by which the Rent Stabilization Ordinance was passed renders the Ordinance the product of an illegal "contract, combination . . . , or conspiracy." Appellants instead claim that, regardless of the manner of its enactment, the regulatory scheme established by the Ordinance, on its face, conflicts with the Sherman Act and therefore is pre-empted.

Recognizing that the function of government may often be to tamper with free markets, correcting their failures and aiding their victims, this Court noted in *Rice* v. *Norman Williams Co.*, *supra*, that a "state statute is not pre-empted by the federal antitrust laws simply because the state scheme may have an anticompetitive effect," *id.*, at 659. See *Exxon Corp.* v. *Governor of Maryland*, 437 U. S. 117, 133 (1978). We have therefore held that a state statute should be struck down on pre-emption grounds "only if it mandates or authorizes conduct that necessarily constitutes a violation of the antitrust laws in all cases, or if it places irresistable pressure on a private party to violate the antitrust laws in order to comply with the statute." 458 U. S., at 661.

While *Rice* involved a state statute rather than a municipal ordinance, the rule it established does not distinguish between the two. As in other pre-emption cases, the analysis is the same for the acts of both levels of government. See, *e. g.*, *White* v. *Massachusetts Council of Construction Employers, Inc.*, 460 U. S. 204 (1983). Only where legislation is found to conflict "irreconcilably" with the antitrust laws, *Rice*, *supra*, at 659, does the level of government responsible for its enactment become important. Legislation that would otherwise be pre-empted under *Rice* may nonetheless survive if it is found to be state action immune from antitrust scrutiny under *Parker* v. *Brown*, 317 U. S. 341 (1943). The ultimate source of that immunity can be only the State, not its subdivisions. See *Community Communications Co.* v. *Boulder*, 455 U. S., at 50–51; *Lafayette* v. *Louisiana Power & Light Co.*, 435 U. S. 389, 412–413 (1978) (opinion of BRENNAN, J.).

A

Appellants argue that Berkeley's Rent Stabilization Ordinance is pre-empted under *Rice* because it imposes rent ceilings across the entire rental market for residential units. Such a regime, they contend, clearly falls within the *per se* rule against price fixing, a rule that has been one of the settled points of antitrust enforcement since the earliest days of the Sherman Act, see *Arizona* v. *Maricopa County Medical Society* 457 U. S. 332, 344–348 (1982); *United States* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150, 218 (1940). That the prices set here are ceilings rather than floors and that the public interest has been invoked to justify this stabilization should not, appellants argue, save Berkeley's regulatory scheme from condemnation under the *per se* rule.

Certainly there is this much truth to appellants' argument: Had the owners of residential rental property in Berkeley voluntarily banded together to stabilize rents in the city, their activities would not be saved from antitrust attack by claims that they had set reasonable prices out of solicitude for the welfare of their tenants. See *National Society of Professional Engineers* v. *United States*, 435 U. S., at 695; *United States* v. *Trans-Missouri Freight Assn.*, 166 U. S. 290 (1897). Moreover, it cannot be denied that Berkeley's Ordinance will affect the residential housing rental market in much the same way as would the philanthropic activities of this hypothetical trade association. What distinguishes the operation of Berkeley's Ordinance from the activities of a benevolent landlords' cartel is not that the Ordinance will necessarily have a different economic effect, but that the rent ceilings imposed by the Ordinance and maintained by the Stabilization Board have been unilaterally imposed by government upon landlords to the exclusion of private control.

The distinction between unilateral and concerted action is critical here. Adhering to the language of § 1, this Court has always limited the reach of that provision to "unreasonable restraints of trade effected by a 'contract, combination . . . , or conspiracy' between *separate* entities." *Copperweld Corp.* v. *Independence Tube Corp.*, 467 U. S. 752, 768 (1984) (emphasis in original). We have therefore deemed it "of considerable importance" that independent activity by a single entity be distinguished from a concerted effort by more than one entity to fix prices or otherwise restrain trade, *Monsanto Co.* v. *Spray-Rite Service Corp.*, 465 U. S. 752, 763 (1984). Even where a single firm's restraints directly affect prices and have the same economic effect as concerted action might have, there can be no liability under § 1 in the absence of agreement. *Id.*, at 760–761; *United States* v. *Parke, Davis & Co.*, 362 U. S. 29, 44 (1960). Thus, if the Berkeley Ordinance stabilizes rents without this element of concerted action, the program it establishes cannot run afoul of § 1.

Recognizing this concerted action requirement, appellants argue that the Ordinance "forms a combination between [the City of Berkeley and its officials], on the one hand, and the property owners on the other. It also creates a horizontal combination among the landlords." Reply Brief for Appellants 10, n. 7. In so arguing, appellants misconstrue the concerted action requirement of § 1. A restraint imposed unilaterally by government does not become concerted action within the meaning of the statute simply because it has a coercive effect upon parties who must obey the law. The ordinary relationship between the government and those who must obey its regulatory commands whether they wish to or not is not enough to establish a conspiracy. Similarly, the mere fact that all competing property owners must comply with the same provisions of the Ordinance is not enough to establish a conspiracy among landlords. Under Berkeley's Ordinance, control over the maximum rent levels of every affected residential unit has been unilaterally removed from the owners of those properties and given to the Rent Stabilization Board. While the Board may choose to respond to an individual landlord's petition for a special adjustment of a particular rent ceiling, it may decide not to. There is no meeting of the minds here. See *American Tobacco Co.* v. *United States*, 328 U. S. 781, 810 (1946), quoted in *Monsanto, supra*, at 764. The owners of residential property in Berkeley have no more freedom to resist the city's rent controls than they do to violate any other local ordinance enforced by substantial sanctions.

B

Not all restraints imposed upon private actors by government units necessarily constitute unilateral action outside the purview of § 1. Certain restraints may be characterized as "hybrid," in that nonmarket mechanisms merely enforce private marketing decisions. See *Rice* v. *Norman Williams Co.*, 458 U. S., at 665 (STEVENS, J., concurring in the judgment). Where private actors are thus granted "a degree of private regulatory power," *id.*, at 666, n. 1, the regulatory scheme may be attacked under § 1. Indeed, this Court has twice found such hybrid restraints to violate the Sherman Act. See *Schwegmann Bros.* v. *Calvert Distillers Corp.*, 341 U. S. 384 (1951); *California Retail Liquor Dealers Assn.* v. *Midcal Aluminum, Inc.*, 445 U. S. 97 (1980).

In *Schwegmann*, a Louisiana statute authorized a distributor to enforce agreements fixing minimum retail prices not only against parties to such contracts, but also against retailers who sold the distributor's products without having agreed to the price restrictions. After finding that the statute went far beyond the now-repealed Miller-Tydings Act, which offered a limited antitrust exemption to certain "'contracts or agreements prescribing minimum prices for the resale'" of specified commodities, the Court held that two liquor distributors had violated § 1 when they attempted to hold a retailer to the price-fixing terms of a contract it had refused to sign. In so holding, the Court noted that "when a state compels retailers to follow a parallel price policy, it demands private conduct which the Sherman Act forbids." 341 U.S, at 389. However, under the Louisiana statute, both the selection of minimum price levels and the exclusive power to enforce those levels were left to the discretion of distributors. While the petitioner-retailer in that case may have been legally required to adhere to the levels so selected, the involvement of his suppliers in setting those prices made it impossible to characterize the regulation as unilateral action by the State of Louisiana.

The trade restraint condemned in *Midcal* entailed a similar degree of free participation by private economic actors. That case presented an antitrust challenge to California's requirement that all wine producers, wholesalers, and rectifiers file fair trade contracts or price schedules with the State. If a wine producer did not set prices, wholesalers had to post a resale price schedule for that producer's brands. No state-licensed wine merchant could sell wine to a retailer at other than those prices. 445 U. S., at 99. The Court found that "California's system for wine pricing plainly constitutes resale price maintainance in violation of the Sherman Act . . . . The wine producer holds the power to prevent price competition by dictating the prices charged by wholesalers." *Id.*, at 103. Here again, the mere existence of legal compulsion did not turn California's scheme into unilateral action by the State. The Court noted: "The State has no direct control over wine prices, and it does not review the reasonableness of the prices set by wine dealers." *Id.*, at 100.

The hybrid restraints condemned in *Schwegmann* and *Midcal* were thus quite different from the pure regulatory scheme imposed by Berkeley's Rent Stabilization Ordinance.

While the Ordinance does give tenants—certainly a group of interested private parties—some power to trigger the enforcement of its provisions, it places complete control over maximum rent levels exclusively in the hands of the Rent Stabilization Board. Not just the controls themselves but also the rent ceilings they mandate have been unilaterally imposed on the landlords by the city.

C

There may be cases in which what appears to be a state- or municipality-administered price stabilization scheme is really a private price-fixing conspiracy, concealed under a "gauzy cloak of state involvement," *Midcal*, *supra*, at 106. This might occur even where prices are ostensibly under the absolute control of government officials. However, we have been given no indication that such corruption has tainted the rent controls imposed by Berkeley's Ordinance. Adopted by popular initiative, the Ordinance can hardly be viewed as a cloak for any conspiracy among landlords or between the landlords and the municipality. Berkeley's landlords have simply been deprived of the power freely to raise their rents. That is why they are here. And that is why their role in the stabilization program does not alter the restraint's unilateral nature.[2]

III

Because under settled principles of antitrust law, the rent controls established by Berkeley's Ordinance lack the element of concerted action needed before they can be characterized as a *per se* violation of § 1 of the Sherman Act, we cannot say that the Ordinance is facially inconsistent with the federal antitrust laws. See *Rice* v. *Norman Williams Co.*, *supra*, at 661. We therefore need not address whether, even if the controls were to mandate § 1 violations, they would be exempt under the state-action doctrine from antitrust scrutiny. See *Town of Hallie* v. *City of Eau Claire*, 471 U. S. ——, —— (1985).

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[2] Though they have not pressed the point with any vigor in this Court, appellants have suggested that Berkeley's rent controls constitute attempted monopolization because the city "is clearly engaged in the provision of housing in the public sector" and using the controls to depress the prices of residential properties as a prelude to taking them over. Tr. of Oral Arg. 14–15. As to this claim, we note only that the inquiry demanded by appellants' allegations goes beyond the scope of the facial challenge presented here. See *Rice* v. *Norman Williams Co.*, 458 U. S., at 661.

The judgment of the California Supreme Court is

Affirmed.

SUPREME COURT OF THE UNITED STATES

No. 84-1538

ALEXANDRA FISHER, ET AL., APPELLANTS *v.* CITY OF BERKELEY, CALIFORNIA, ET AL.

ON APPEAL FROM THE SUPREME COURT OF CALIFORNIA

[February 26, 1986]

JUSTICE POWELL, concurring in the judgment.

The Court today reaches out to decide a difficult preemption question when a straightforward and well-settled ground for decision is available. In my view, Berkeley's ordinance plainly falls within the "state action" exemption of *Parker* v. *Brown*, 317 U. S. 341 (1943), and its progeny. I therefore concur in the judgment, but on grounds different from those discussed in the Court's opinion.

When a municipal government engages in anticompetitive activity pursuant to a clearly articulated state policy to displace competition with regulation, the "state action" exemption removes the conduct from the coverage of the antitrust laws. *Town of Hallie* v. *City of Eau Claire*, 471 U. S. ——, —— (1985); *Community Communications Co.* v. *City of Boulder*, 455 U. S. 40, 54 (1982). In *Town of Hallie*, we found such a policy embodied in a state statute that "delegated to [municipalities] the express authority to take action that foreseeably will result in anticompetitive effects." *Id.*, at ——. See also *City of Lafayette* v. *Louisiana Power & Light Co.*, 435 U. S. 389, 415 (1978) (opinion of BRENNAN, J.) ("an adequate state mandate for anticompetitive activities . . . exists when it is found 'from the authority given a governmental entity to operate in a particular area, that the legislature contemplated the kind of action complained of'") (citation omitted). Thus, the question in this case is whether California has expressly delegated to Berkeley regulatory power that foreseeably would lead to the anticompetitive effects challenged by appellants.

The history of Berkeley's ordinance is illuminating. Prior to 1974, Article XI, §3 of the California Constitution[1] required the state legislature to approve all changes in municipal charters. In 1972, in a city-wide referendum, Berkeley's citizens approved a charter amendment authorizing rent control. This charter amendment effectively froze rents at 1971 levels, subject to individual adjustments by a popularly elected rent control board. *Birkenfeld* v. *City of Berkeley*, 17 Cal. 3d 129, 138, 550 P. 2d 1001, 1008 (1976). The California Legislature ratified the charter amendment on August 2, 1972, and the rent control plan went into effect. 1972 Cal. Stat. 3370. A group of landlords challenged the rent control plan on a number of constitutional and statutory grounds. In the ensuing litigation, the California Supreme Court invalidated the plan on the ground that it lacked procedural safeguards necessary to protect landlords from confiscatory rent ceilings.[2] *Birkenfeld, supra*, at 170–172, 550 P. 2d, at 1030–1032. In 1980, in another referendum, Berkeley's citizens adopted the ordinance at issue in this case. This ordinance provided the procedural protections that the 1972 charter provision lacked, and it subsequently survived constitutional challenge in state court. *Fisher* v. *City of Berkeley*, 37 Cal. 3d 644, 679–691, 693 P. 2d 241, 289–298 (1984).

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[1] When Berkeley's charter amendment was passed in 1972, Article XI, §3(a) of the California Constitution read:

"For its own government, a county or city may adopt a charter by majority vote of its electors voting on the question. The charter is effective when filed with the Secretary of State. A charter may be amended, revised, or repealed in the same manner. A charter, amendment, revision, or repeal thereof shall be published in the official state statutes. . . . The provisions of a charter are the law of the State and have the force and effect of legislative enactments."

This provision was construed to require that charter amendments be approved by concurrent resolution of both houses of the state legislature. *Birkenfeld* v. *City of Berkeley*, 17 Cal. 3d 129, 137, n. 2, 550 P. 2d 1001, 1007, n. 2 (1976).

[2] The 1972 charter provision permitted individual adjustments of the across-the-board rent ceiling only on a unit-by-unit basis, and only after a hearing on the particular unit whose rent was to be raised. The California Supreme Court found that this limitation "put the [rent control board] in a procedural strait jacket," and "unnecessarily preclude[d] reasonably

The challenged ordinance thus replaces a rent control plan that was expressly authorized by the state legislature. Under *Town of Hallie*, a general grant of authority to regulate rents would have sufficed to exempt Berkeley's ordinance from the antitrust laws. 471 U. S., at ——. It follows that the legislature's ratification of a particular rent control plan must also trigger the state-action exemption. See *id.*, at ——; *City of Boulder*, 455 U. S., at 55–56. The remaining issue is whether the authority granted in 1972 remains intact.

Appellants contend that it does not. First, appellants argue that the California Supreme Court's decision in *Birkenfeld*, invalidating the 1972 charter provision, effectively cancelled the legislature's ratification of that provision. *Birkenfeld* did not, however, decide that rent control was bad policy, or that it was inconsistent with state law. See *Birkenfeld*, 17 Cal. 3d, at 159–164, 550 P. 2d, at 1023–1026 (finding that enacting a rent control plan was a permissible exercise of the city's police power); Comment, 65 Cal. L. Rev. 304, 305 (1977) ("*Birkenfeld* offers California cities . . . the judicial equivalent of a rent control enabling act"). Rather, the decision stands only for the proposition that cities must couple rent control with procedures for adjusting rent ceilings to avoid fixing rents at confiscatory levels. 17 Cal. 3d, at 167–173, 550 P. 2d, at 1028–1033. *Birkenfeld* thus left Berkeley's basic power to impose rent controls unaffected.

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prompt action" on meritorious petitions by landlords. *Birkenfeld*, *supra*, at 171, 172, 550 P. 2d, at 1031, 1032.

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Second, appellants contend that since 1972 the State legislature has declared its neutrality respecting a city's decision to control rents. See *City of Boulder*, *supra*, at 55 (clear articulation requirement is not satisfied "when the State's position is one of mere *neutrality* respecting the municipal actions challenged as anticompetitive"). This argument rests on the passage in 1980 of a comprehensive planning and zoning law, one provision of which states:

> "Nothing in this article shall be construed to be a grant of authority *or a repeal of any authority which may exist* of a local government to impose rent controls or restrictions on the sale of real property." Cal. Govt. Code Ann. § 65589(b) (West 1983) (emphasis added).

By its express terms this statute leaves intact cities' preexisting authority to adopt rent control provisions. For purposes of the clear articulation requirement, Berkeley's preexisting authority is defined by the legislature's ratification of the city's 1972 charter amendment.

For these reasons, I would find that Berkeley's ordinance is exempt from the antitrust laws under our decisions in *Town of Hallie* and *City of Boulder*. By ratifying Berkeley's charter amendment, the state legislature expressly authorized Berkeley to control rents. The State has not since rescinded that authorization. That is all we need decide in this case.

I therefore concur in the judgment, and express no view on the merits of the preemption issue decided by the Court.

SUPREME COURT OF THE UNITED STATES

No. 84-1538

ALEXANDRA FISHER, ET AL., APPELLANTS *v.* CITY OF BERKELEY, CALIFORNIA, ET AL.

ON APPEAL FROM THE SUPREME COURT OF CALIFORNIA

[February 26, 1986]

JUSTICE BRENNAN, dissenting.

Since *Parker* v. *Brown*, 317 U. S. 341 (1943), the Court has wrestled with the question of the degree to which federal antitrust laws prohibit state and local governments from imposing anticompetitive restraints on trade. Laws which impose such restraints have been held to be exempt from antitrust scrutiny if they constitute action of the State itself in its sovereign capacity, or state-authorized municipal action in furtherance or implementation of clearly articulated and affirmatively expressed state policy. See *Community Communications Co.* v. *Boulder*, 455 U. S. 40, 52 (1982). Today, the Court holds that a municipality's price-fixing scheme is not pre-empted by the federal antitrust laws whether or not the scheme is state-authorized, or furthers or implements a clearly articulated and affirmatively expressed state policy. Because today's decision discards over 40 years of carefully considered precedent, I respectfully dissent.

I

A

Berkeley's Rent Stabilization Ordinance (hereafter Ordinance) effectively fixes prices for rental units in the city of Berkeley. In *Rice* v. *Norman Williams Co.*, 458 U. S. 654, 661 (1982), we held that a state statute:

> "may be condemned under the antitrust laws only if it mandates or authorizes conduct that necessarily consti-

> tutes a violation of the antitrust laws in all cases, or if it places irresistable pressure on a private party to violate the antitrust laws in order to comply with the statute. Such condemnation will follow under § 1 of the Sherman Act when the conduct contemplated by the statute is in all cases a *per se* violation."

In this case, by declaring maximum prices landlords may charge, Berkeley's Ordinance irresistably pressures landlords to fix prices for their rental units. Thus, the Ordinance "facially conflict[s] with the Sherman Act because it *mandate[s]* [price fixing], an activity that has long been regarded as a *per se* violation of the Sherman Act." *Id.*, at 659–660 (emphasis in original).

The Court recognizes that the Ordinance imposes anticompetitive restraints on trade, and that it has the same effect on the housing market as would a conspiracy by landlords to fix rental prices. *Ante*, at 5. Despite this, the Court holds that the Ordinance is not pre-empted by the Sherman Act because prices are fixed "unilaterally" by the city, rather than by "contract, combination, or conspiracy." I do not read our decisions necessarily to require proof of such concerted action as a prerequisite to a finding of pre-emption. Certainly, nothing we said in *Rice* supports such a narrow view of pre-emption.[1] Our other decisions have found statutes in conflict with the Sherman Act because they eliminated price competition in the relevant market.

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[1] *Rice* held that a "state statute is not pre-empted by the federal antitrust laws simply because the state scheme might have an anticompetitive effect." 458 U. S., at 659. *Rice* involved a challenge to a California statute which effectively allowed liquor distillers to control distribution of their products in the State. The Court concluded that because such vertical *nonprice* restraints are not *per se* illegal under the Sherman Act, see *Continental T.V., Inc.* v. *GTE Sylvania Inc.*, 433 U. S. 36 (1977), the statute was not pre-empted. 458 U. S., at 661; see also *Exxon Corp.* v. *Governor of Maryland*, 437 U. S. 117 (1978); *Joseph E. Seagram & Sons, Inc.* v. *Hostetter*, 384 U. S. 35 (1966). In contrast, Berkeley's Rent Stabilization Board fixes prices for rental units in the city. Unlike *nonprice* restraints, *price fixing* has traditionally been held to be *per se* illegal under the Sher-

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In *California Retail Liquor Dealers Assn.* v. *Midcal Aluminum, Inc.*, 445 U. S. 97 (1980), a wine wholesaler sought to enjoin enforcement of a California statute which effectively required it to sell wines at prices set by producers. The Court focused on the fact that the statute eliminated price competition, and held that the wine-pricing system constituted resale price maintenance in violation of the Sherman Act. The *Midcal* decision squarely controls the result here. Just as the statute challenged in *Midcal* compelled wine wholesalers to charge prices set by wine producers, Berkeley's Ordinance compels landlords to charge prices set by the city. The city "holds the power to prevent price competition by dictating the prices charged" by landlords. *Id.*, at 103. "[S]uch vertical control destroys horizontal competition as effectively as if [landlords] 'formed a combination and endeavored to establish the same restrictions . . . by agreement with each other.'" *Ibid.* (quoting *Dr. Miles Medical Co.* v. *John D. Park & Sons Co.*, 220 U. S. 373, 408 (1911)).

Schwegmann Bros. v. *Calvert Distillers Corp.*, 341 U. S. 384 (1951), is also directly on point. In *Schwegmann*, a Louisiana statute authorized liquor distributors to enforce agreements fixing minimum retail prices on their products against retailers who had not agreed to the price restrictions. The Court held that the statutory scheme amounted to resale price maintenance, in violation of the Sherman Act. To paraphrase the Court in *Schwegmann*, "when [the city] compels [landlords] to follow a parallel price policy, it demands private conduct which the Sherman Act forbids." *Id.*, at 389. "[W]hen [landlords] are *forced* to abandon price competition, they are driven into a compact in violation of the spirit of the proviso which forbids 'horizontal' price fixing." *Ibid.* (emphasis in original).

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man Act. See *Dr. Miles Medical Co.* v. *John D. Park & Sons Co.*, 220 U. S. 373 (1911).

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B

Even if I accepted the Court's analysis of the antitrust preemption issue, I would find a functional "combination" in this case between the city of Berkeley and its officials, on the one hand, and the landlords on the other—a combination that operates to fix prices for rental units in Berkeley. To reach a contrary result, the Court simply states a conclusion—that "[a] restraint imposed unilaterally by government does not become concerted action within the meaning of the statute simply because it has a coercive effect upon parties who must obey the law." *Ante*, at 6. The Court doesn't explain why this is so—it simply baldly asserts that "[t]he ordinary relationship between the government and those who must obey its regulatory commands whether they wish to or not is not enough to establish a conspiracy." *Ibid.* The best I can make of this is that the Court apparently would interpret the Sherman Act to forbid only privately arranged price-fixing schemes. See *ante*, at 7–9. That interpretation would be plainly misguided.

Section 1 of the Sherman Act declares illegal restraints of trade resulting from any "contract, combination . . ., or conspiracy." 15 U. S. C. § 1. Understandably, that wording has led the Court to draw a "basic distinction" between concerted and independent action, and to hold that "[i]ndependent action is not proscribed" by § 1. *Monsanto Co.* v. *Spray-Rite Service Corp.*, 465 U. S. 752, 761 (1984). However, until today we have not held, or indeed even suggested, that government-imposed restraints on economic actions cannot constitute concerted action. Rather, both *Schwegmann* and *Midcal* held that state statutes which "had a coercive effect upon parties who must obey the law" violated § 1.[2]

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[2] The Court would distinguish *Schwegmann* and *Midcal* based on the role of private parties in setting prices. *Ante*, at 7–8. The Court characterizes the statutory restraints imposed in those cases as "hybrid, in that nonmarket mechanisms merely enforce private marketing decisions."

If the Ordinance allowed the individual landlords ultimately to set their own rental prices, I might understand the Court's conclusion that any resulting price restraints did not necessarily result from collective action. Cf. *Monsanto Co.* v. *Spray-Rite Service Corp.*, *supra*, at 761. However, because the Ordinance has the force of law, the city can compel landlords to do what the Sherman Act plainly forbids—to fix prices for rental units in Berkeley. Regardless of whether the landlords "agree" to the prices charged, the circumstances here clearly "exclude the possibility that the [city and the landlords] were acting independently." 465 U. S., at 764. The Ordinance eliminates price competition more effectively than any private "agreement" ever could, and is therefore pre-empted by the Sherman Act. The Court's contrary conclusion does not further, as it argues, but rather distorts "traditional antitrust principles." *Ante*, at 4.

II

Ultimately, the Court is holding that a municipality's authority to protect the public welfare should not be constrained by the Sherman Act. That holding excludes a

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Ante, at 7. In this case, the Court argues, Berkeley's landlords have no control over the prices they charge. *Ibid.*

True, in both cases private parties, rather than the State, were largely responsible for setting the prices that retailers had to adhere to. However, the lack of state supervision over price-fixing activities was only relevant to whether the challenged statutes were immune from antitrust liability under *Parker* v. *Brown*, 317 U. S. 341 (1943), see *Midcal*, 445 U. S., at 105; neither decision drew the distinction the Court today creates between "unilateral" and "hybrid" governmental restraints. In both cases the challenged statute was found invalid simply because it compelled private parties to charge fixed prices for their products, conduct which the Sherman Act forbids. See *Schwegmann*, 341 U. S., at 389; *Midcal*, *supra*, at 103. The Court's "distinction" ignores the fact that price fixing has the same deleterious effect upon the competitive market whether prices are set by an administrative body or by private parties. Thus, regardless of whether Berkeley's landlords have some role in setting the prices they must charge, the coercive effect of the city's Ordinance results in concerted action violative of the Sherman Act.

broad range of local government anticompetitive activities from the reach of the antitrust laws. This flies in the face of the fact that Congress has not enacted such a broad antitrust exemption for municipalities. See *Community Communications Co.* v. *Boulder*, 455 U. S. 40 (1982); *Lafayette* v. *Louisiana Power & Light Co.*, 435 U. S. 389 (1978); cf. 15 U. S. C. § 35(a) (1982 ed., Supp. II) (immunizing local governments only from liability for damages for violations of the antitrust laws). "In light of the serious economic dislocation which could result if cities were free to place their own parochial interests above the Nation's economic goals reflected in the antitrust laws, . . . we [have been] especially unwilling to presume that Congress intended to exclude anticompetitive municipal action from their reach." *Lafayette*, *supra*, at 412–413 (plurality opinion). "The *Parker* state-action exemption reflects Congress' intention to embody in the Sherman Act the federalism principle that the States possess a significant measure of sovereignty under our Constitution. But this principle contains its own limitation: Ours is a '*dual* system of government,' *Parker*, 317 U. S., at 351 (emphasis added), which has no place for sovereign cities." *Community Communications Co.* v. *Boulder*, *supra*, at 53. Of course, our decisions do not foreclose municipalities from enacting anticompetitive measures in the public interest, but only require that such actions be state-authorized and be implemented pursuant to a clearly articulated and affirmatively expressed state policy to displace competition with regulation or monopoly service. See 455 U. S., at 52. Berkeley's Ordinance plainly is not exempt from antitrust scrutiny under this standard.

Appellees suggest that three considerations support their argument that the Ordinance implements a clearly articulated and affirmatively expressed state policy authorizing municipalities to enact rent control measures: (1) the state legislature's 1972 ratification of a city rent control charter amendment; (2) the California Supreme Court's decision in

Birkenfeld v. *City of Berkeley*, 17 Cal.3d 129, 550 P. 2d 1001 (1976), which ultimately invalidated that amendment; and (3) the city's state-law obligation to provide affordable housing. None of these considerations support appellees' position.

First, in 1972, Berkeley adopted a rent control charter amendment, which was approved by concurrent resolution of both houses of the state legislature.[3] There are serious doubts that this purely *pro forma* approval would qualify the amendment for the *Parker* exemption. See *Cantor* v. *Detroit Edison Co.*, 428 U. S. 579 (1976). In any event, that amendment was subsequently invalidated by the California Supreme Court, and the legislature's actions respecting its passage afford no support for the claimed exemption of the *current* Ordinance from antitrust scrutiny.

Second, the *Birkenfeld* decision, while invalidating Berkeley's rent control amendment, found state authority for such measures in constitutional provisions conferring upon cities the power to "make and enforce . . . all local, police, sanitary, and other ordinances and regulations not in conflict with general laws." 17 Cal. 3d, at 140, 550 P. 2d, at 1009–1010. But we have made clear that such general grants of authority do not constitute the required mandate to engage in conduct that necessarily constitutes a violation of the antitrust laws. See *Community Communications Co.*, *supra*, at 55. "Acceptance of such a proposition . . . would wholly eviscerate the concepts of 'clear articulation and affirmative expression' that our precedents require." *Id.*, at 56.

Third, state law requires cities to "make adequate provision for the housing needs of all economic segments of the community." Cal. Govt. Code Ann. § 65580(d) (West 1983). But, although appellees argue that rent control measures are a "foreseeable result" of these statutory obligations, see

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[3] At that time, the State Constitution required the legislature to approve city charter amendments. See *Birkenfeld*, 17 Cal. 3d, at 137 n. 2, 550 P. 2d, at 1007, n. 1. In 1974, the State Constitution was amended to eliminate this requirement.

Hallie v. *Eau Claire*, 471 U. S. —— (1985), those laws are expressly neutral with respect to a city's authority to impose rent controls. Cal. Govt. Code Ann. § 65589(b) (West 1983) expressly provides "nothing in this article shall be construed to be a grant of authority or a repeal of any authority which may exist of a local government to impose rent controls." See also Cal. Health & Safety Code Ann. § 50202 (West Supp. 1986) ("nothing in this division shall authorize the imposition of rent regulations or controls"). The requirement of "'clear articulation and affirmative expression' is not satisfied when the State's position is one of mere *neutrality* respecting the municipal actions challenged as anticompetitive." *Community Communications Co.*, 455 U. S., at 55 (emphasis in original). Plainly, by that standard the Ordinance does not qualify for the *Parker* exemption from antitrust liability.

III

Finally, appellees suggest that a finding of pre-emption in this case will severely restrict a municipality's authority to enact a variety of measures in the public interest. "But this argument is simply an attack upon the wisdom of the longstanding congressional commitment to the policy of free markets and open competition embodied in the antitrust laws." *Community Communications Co.*, *supra*, at 56. Congress may ultimately agree with appellees' argument, and may choose to amend the antitrust laws to grant municipalities broad discretion to enact anticompetitive measures in the public interest. Pending such amendment, however, only a clearly articulated and affirmatively expressed state policy will exempt ordinances like this from the reach of the Sherman Act.

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(Slip Opinion)

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Lumber Co.*, 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

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CONNOLLY ET AL., TRUSTEES OF THE OPERATING ENGINEERS PENSION TRUST *v.* PENSION BENEFIT GUARANTY CORPORATION ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA

No. 84-1555. Argued December 2, 1985—Decided February 26, 1986*

The Employee Retirement Income Security Act (ERISA), enacted in 1974, established a pension plan termination insurance program whereby the Pension Benefit Guaranty Corporation (PBGC), a wholly owned Government corporation, collects insurance premiums from covered private retirement plans and provides benefits to participants if their plan terminates with insufficient assets to support the guaranteed benefits. The program covers both single-employer and multiemployer pension plans. With respect to the latter plans, ERISA delayed mandatory payment of guaranteed benefits until January 1, 1978, prior to which date the PBGC had discretionary authority to pay benefits upon the termination of a pension plan. As that date approached, Congress became concerned that a significant number of multiemployer plans were experiencing extreme financial hardship, and that implementation of mandatory guarantees might induce several large plans to terminate, thus subjecting the insurance system to liability beyond its means. After further delaying the effective date for the mandatory guarantees, Congress enacted the Multiemployer Pension Plan Amendments Act of 1980 (MPPAA) requiring an employer withdrawing from a multiemployer pension plan to pay a fixed and certain debt to the plan amounting to the employer's proportionate share of the plan's "unfunded vested benefits." Appellant trustees administer a multiemployer pension plan for employers under collective-bargaining agreements covering employees in the construction industry in California and Nevada. Under the

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*Together with No. 84-1467, *Woodward Sand Co., Inc.* v. *Pension Benefit Guaranty Corporation et al.*, also on appeal from the same court.

trust agreement and the plan, the employer's sole obligation is to pay the contributions required by the collective-bargaining agreements, and the employer's obligation for pension benefits is ended when the employer pays the contribution to the pension trust. Prior to enactment of the MPPAA, the trustees filed suit against the PBGC in Federal District Court, claiming, *inter alia*, that ERISA was unconstitutional as depriving the trustees, the employers, and the plan participants of property without proper compensation. During the course of the litigation, the MPPAA was enacted, and the District Court permitted the trustees to file an amended complaint to include a challenge to that Act. Ultimately, the District Court granted summary judgment in the PBGC's favor, rejecting appellants' argument that imposition of withdrawal liability under the MPPAA violates the Taking Clause of the Fifth Amendment.

Held: The withdrawal liability provisions of the MPPAA do not violate the Taking Clause. Pp. 9–16.

(a) In this case, the United States under the MPPAA has taken nothing for its own use and only has nullified a contractual provision limiting liability by imposing an additional obligation that is otherwise within Congress' power to impose. That the statutory withdrawal liability will operate in this manner and will redound to the benefit of the pension trust does not justify a holding that the withdrawal liability provisions violate the Taking Clause. Pp. 9–12.

(b) In identifying a "taking" forbidden by the Taking Clause, three factors should be considered: (1) "the economic impact of the regulation on the claimant"; (2) "the extent to which the regulation has interfered with distinct investment-backed expectations"; and (3) "the character of the governmental action." *Penn Central Transportation Co.* v. *New York City*, 438 U. S. 104, 124. Examining the MPPAA in light of these factors supports the conclusion that the imposition of withdrawal liability does not constitute a compensable taking under the Taking Clause. The interference with an employer's property rights resulting from requiring the employer to fund its share of the pension plan obligation arises from a public program that adjusts the benefits and burdens of economic life to promote the common good and does not constitute a taking requiring Government compensation. As to the severity of the MPPAA's economic impact, there is nothing to show that the withdrawal liability imposed on an employer will always be out of proportion to its experience with the pension plan. And as to interference with reasonable investment-backed expectations, employers had more than sufficient notice not only that pension plans were being regulated at the time the MPPAA

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was enacted but also that withdrawal itself might trigger additional financial obligations. Pp. 12–16.

Affirmed.

WHITE, J., delivered the opinion for a unanimous Court. O'CONNOR, J., filed a concurring opinion, in which POWELL, J., joined.

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D. C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

Nos. 84-1555 AND 84-1567

JOHN L. CONNOLLY, ET AL., ETC., APPELLANTS
84-1555 *v.*
PENSION BENEFIT GUARANTY CORPORATION,
ETC., ET AL.

WOODWARD SAND COMPANY, INC., APPELLANT
84-1567 *v.*
PENSION BENEFIT GUARANTY CORPORATION,
ETC., ET AL.

ON APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA

[February 26, 1986]

JUSTICE WHITE delivered the opinion of the Court.

In *Pension Benefit Guaranty Corporation* v. *R. A. Gray & Co.*, 467 U. S. 717 (1984), the Court held that retroactive application of the withdrawal liability provisions of the Multiemployer Pension Plan Amendments Act of 1980 did not violate the Due Process Clause of the Fifth Amendment. In these cases, we address the question whether the withdrawal liability provisions of the Act are valid under the Clause of the Fifth Amendment that forbids the taking of private property for public use without just compensation.

I

A

The background and legislative history of both the Employee Retirement Income Security Act (ERISA), 88 Stat. 829, 29 U. S. C. § 1001-1381 (1976) and the Multiemployer Pension Plan Amendments Act of 1980 (MPPAA or Act), 94

Stat. 1208, 29 U. S. C. § 1381-1453, are set forth in detail in *Gray, supra,* at 720–725. We therefore only summarize the relevant portions of that description for purposes of our discussion here.

Congress enacted ERISA in 1974 to provide comprehensive regulation for private pension plans. In addition to prescribing standards for the funding, management, and benefit provisions of these plans, ERISA also established a system of pension benefit insurance. This "comprehensive and reticulated statute" was designed "to ensure that employees and their beneficiaries would not be deprived of anticipated retirement benefits by the termination of pension plans before sufficient funds have been accumulated in the plans. . . . Congress wanted to guarantee that 'if a worker has been promised a defined pension benefit upon retirement—and if he has fulfilled whatever conditions are required to obtain a vested benefit—he will actually receive it.'" *Id.*, at 720, quoting *Nachman Corporation* v. *Pension Benefit Guaranty Corporation*, 446 U. S. 359, 361–362, 374–375 (1980) (citations omitted).

To achieve this goal of protecting "anticipated retirement benefits," Congress created the Pension Benefit Guaranty Corporation (PBGC), a wholly owned Government corporation, to administer an insurance program for participants in both single-employer and multiemployer pension plans. 29 U. S. C. § 1302 (1976 ed.). For single employer plans that were in default, ERISA immediately obligated the PBGC to pay benefits. § 1381. With respect to multiemployer plans, ERISA delayed mandatory payment of guaranteed benefits until January 1, 1978. Until that date, Congress gave the PBGC discretionary authority to pay benefits upon the termination of multiemployer pension plans. § 1381(c)(2)–(4). As with single-employer plans, all contributors to covered multiemployer plans were assessed insurance premiums payable to the PBGC. If the PBGC exercised its discretion to pay benefits upon a plan's termination, all employers that had contributed to the plan during the five years preceding its termination were liable to the PBGC in amounts proportional to their shares of the plan's contribution during that period, subject to the limitation that any individual employer's liability could not exceed 30% of the employer's net worth. § 1362(b)(2).

During the period between the enactment of ERISA and 1978, when mandatory multiemployer guarantees were due to go into effect, the PBGC extended coverage to numerous plans. "Congress became concerned that a significant number of plans were experiencing extreme financial hardship," *Gray*, *supra*, at 721, and that implementation of mandatory guarantees for multiemployer plans might induce several large plans to terminate, thus subjecting the insurance system to liability beyond its means. As a result, Congress delayed the effective date for the mandatory guarantees for 18 months, Pub. L. 95–214, 91 Stat. 1501, and directed the PBGC to prepare a report analyzing the problems of multiemployer plans and recommending possible solutions. See S. Rep. No. 95–570, pp. 1–4 (1977); H. R. Rep. No. 95–706, p. 1 (1977).

The PBGC's report found, *inter alia*, "that ERISA did not adequately protect plans from the adverse consequences that resulted when individual employers terminate their participation in, or withdraw from, multiemployer plans." *Gray*, *supra*, at 722. The "basic problem," the report found, was the threat to the solvency and stability of multiemployer plans caused by employer withdrawals, which existing law actually encouraged. Pension Benefit Guaranty Corporation, Multiemployer Study Required by P. L. 95–214 (1978) 96–97 (PBGC Report).[1] As the PBGC's Executive Director explained:

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[1] The inadequacy of existing law was demonstrated by the Report's finding that roughly 10 percent of all multiemployer plans, covering 1.3 million participants, were experiencing financial difficulties. PBGC Report, at 1.

> "A key problem of ongoing multiemployer plans, especially in declining industries, is the problem of employer withdrawal. Employer withdrawals reduce a plan's contribution base. This pushes the contribution rate for remaining employers to higher and higher levels in order to fund past service liabilities, including liabilities generated by employers no longer participating in the plan, so-called inherited liabilities. The rising costs may encourage—or force—further withdrawals, thereby increasing the inherited liabilities to be funded by an ever decreasing contribution base. This vicious downward spiral may continue until it is no longer reasonable or possible for the pension plan to continue." Pension Plan Termination Insurance Issues: Hearings before the Subcommittee on Oversight of the House Committee on Ways and Means, 95th Cong., 2nd Sess., 22 (1978) (statement of Matthew M. Lind) (hereinafter 1978 Hearings).

"To alleviate the problem of employer withdrawals, the PBGC suggested new rules under which a withdrawing employer would be required to pay whatever share of the plan's unfunded liabilities was attributable to that employer's participation." *Gray*, *supra*, at 723, citing PBGC Report, at 97–114 (footnote omitted). Again, the PBGC Executive Director explained:

Funding of all plan benefits under these plans, if they terminated, would cost the insurance system approximately $4.8 billion and necessitate an increase in premiums to unacceptable levels. *Id.*, at 2, 16, 139. See also Hearings on the Multiemployer Pension Plan Amendments Act of 1979 before the Task Force on Welfare and Pension Plans of the Subcommittee on Labor-Management Relations of the Committee on Education and Labor, House of Representatives, 96th Cong., 1st Sess. 1156, 1170, 1291 (1980). See also Brief for National Coordinating Committee for Multiemployer Plans as *Amicus Curiae* 12–14; Brief of Trustees of United Mine Workers of America 1950 and 1974 Pension Plans as *Amici Curiae* 7.

> "To deal with this problem, our report considers an approach under which an employer withdrawing from a multiemployer plan would be required to complete funding its fair share of the plan's unfunded liabilities. In other words, the plan would have a claim against the employer for the inherited liabilities which would otherwise fall upon the remaining employers as a result of the withdrawal. . . .
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> "We think that such withdrawal liability would, first of all, discourage voluntary withdrawals and curtail the current incentives to flee the plan. Where such withdrawals nonetheless occur, we think that withdrawal liability would cushion the financial impact on the plan." 1978 Hearings, at 23 (statement of Matthew M. Lind).

After 17 months of discussion, Congress agreed with the analysis put forward in the PBGC Report, and drafted legislation which implemented the Report's recommendations. "As enacted, the Act requires that an employer withdrawing from a multiemployer pension plan pay a fixed and certain debt to the pension plan. This withdrawal liability is the employer's proportionate share of the plan's 'unfunded vested benefits,' calculated as the difference between the present value of the vested benefits and the current value of the plan's assets." *Gray*, *supra*, at 725, quoting 29 U. S. C. §§ 1381, 1391.

B

Appellant Trustees administer the Operating Engineers Pension Plan according to a written Agreement Establishing the Operating Engineers Pension Trust, executed in 1960, pursuant to § 302(c)(5) of the Labor Management Relations Act, 1947, 29 U. S. C. § 186(c)(5). App. 29. The Trust receives contributions from several thousand employers under written collective-bargaining agreements covering employees in the construction industry throughout southern California and southern Nevada. Under these collective-bargaining agreements, the employers agree to contribute a certain amount to the Pension Plan, with the actual amount contributed by each employer determined by multiplying their employees' hours of service by a rate specified in the current agreement. See *id.*, at 33–35.

By the express terms of the Trust Agreement, *id.*, at 30–31, and the Plan, *id.*, at 31–32, the employer's sole obligation to the Pension Trust is to pay the contributions required by the collective-bargaining agreement. The Trust Agreement clearly states that the employer's obligation for pension benefits to the employee is ended when the employer pays the appropriate contribution to the Pension Trust.[2] This is true even though the contributions agreed upon are insufficient to pay the benefits under the Plan.[3]

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[2] Article II, Section 7, of the Trust Agreement provides as follows:

"Neither the Employers nor any Signatory Association, or officer, agent, employee or committee member of the Employers or any Signatory Association, shall be liable to make Contributions to the Fund or with respect to the Pension Plan, except to the extent that he or it may be an Individual Employer required to make Contributions to the Fund with respect to his or its own individual or joint venture operations, or to the extent he or it may incur liability as a Trustee as hereinafter provided. Except as provided in Article III hereof, the liability of any Individual Employer to the Fund, or with respect to the Pension Plan, shall be limited to the payments required by the Collective Bargaining Agreements with respect to his or its individual or joint venture operations, and in no event shall he or it be liable or responsible for any portion of the Contributions due from other Individual Employers or with respect to the operations of such Individual Employers. The Individual Employers shall not be required to make any further payments or Contributions to the cost of operations of the Fund or of the Pension Plan, except as may be hereinafter provided in the Collective Bargaining Agreements." App. 30–31.

[3] Article VII, Section 4, of the Plan provides as follows:

"This Pension Plan has been adopted on the basis of an actuarial calculation which has established, to the extent possible, that the contributions will, if continued, be sufficient to maintain the Plan on a permanent basis. However, it is recognized that the benefits provided by this Pension Plan can be paid only to the extent that the Plan has available adequate resources for those payments. No Individual Employer has any liability, directly or indirectly to provide the benefits established by this Plan beyond

In 1975, the Trustees filed suit, seeking declaratory and injunctive relief, claiming that the Pension Plan is a "defined contribution plan" as defined by ERISA, and thus not subject to the jurisdiction of the PBGC.[4] Alternatively, the Trustees argued that if the Plan was subject to the provisions of ERISA requiring premium payments and imposing contingent termination liability, the statute was unconstitutional, as it deprived the Trustees, the employers, and the plan participants of property without due process and without proper compensation.

The District Court granted summary judgment to the Trustees, finding that the Plan was a "defined contribution plan," and enjoining the PBGC from treating it any other manner. 419 F. Supp. 737 (CD Cal. 1976). The Ninth Circuit reversed and remanded for consideration of the constitutional issues. 581 F. 2d 729 (1978), cert. denied, 440 U. S. 935 (1979). On remand, the District Court denied the Trustees' motion to convene a three-judge court on the ground that

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the obligation of the Individual Employer to make contributions as stipulated in any Collective Bargaining Agreement. In the event that at any time the Pension Fund does not have sufficient assets to permit continued payments under this Pension Plan, nothing contained in this Pension Plan and the Trust Agreement shall be construed as obliging any Individual Employer to make benefit payments or contributions (other than the contributions for which the Individual Employer may be obliged by any Collective Bargaining Agreement) in order to provide for the benefits established by the Pension Plan. Likewise, there shall be no liability upon the Board of Trustees, individually or collectively, or upon the Employers, Signatory Association, Individual Employer, or Union to provide the benefits established by this Plan if the Pension Fund does not have the assets to make such benefit payments." *Id.*, at 31–32.

[4] 29 U. S. C. § 1002(34) describes a "defined contribution plan" as "a pension plan which provides for an individual account for each participant and for benefits based solely upon the amount contributed to the participant's account, and any income, expenses, gains and losses, any any forfeitures of accounts of other participants which may be allocated to such participant's account." The Plan Termination Insurance provisions of ERISA do not apply to such plans. § 1321(b)(1).

the Trustees' constitutional challenges were insubstantial. App. 55–56. The Trustees sought a petition of mandamus on the issue, but their petition was denied by both the Ninth Circuit and this Court. *Connolly* v. *Williams*, No. 79–7580 (CA9, Jan. 14, 1980); *Connolly* v. *United States District Court*, 445 U. S. 959 (1980).

On the merits, the District Court granted summary judgment to the PBGC, but the Ninth Circuit reversed. 673 F. 2d 1110 (1982). The court could not agree with the District Court that the constitutional claims raised by the Trustees were so "insubstantial" that a three-judge panel could be summarily denied. *Id.*, at 1114. The Ninth Circuit remanded the case with directions to convene a three-judge court.

During the course of the litigation to convene the three-judge court, Congress enacted the MPPAA. The District Court permitted the Trustees to file an amended complaint to include a challenge to the constitutionality of the new Act. The court also permitted appellant Woodward Sand Co., an employer that had been assessed withdrawal liability by the Trustees, to intervene in the action. App. 82.[5]

After oral argument, the three-judge panel granted summary judgment in favor of the PBGC. The court rejected the appellants' argument that the Act violated the Taking Clause of the Fifth Amendment, holding that "the contractual right which insulates employers from further liability to the pensions plans in which they participate is not 'property' within the meaning of the takings clause." App. to Juris. Statement in No. 84–1555, p. 7. Because the court resolved this issue "on the basis that no 'property' is affected by the MPPAA," it did not discuss whether a "taking" had occurred, or whether the taking would have been for a "public purpose." *Id.*, at 8.[6]

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[5] Penfield & Smith, Inc., Roy L. Klema Engineers, Inc., and Municipal Engineers, Inc., also intervened in the proceedings before the District Court. These employers are not parties to this appeal, however, as the Trustees have determined that they have incurred no liability under Act. Brief for Appellant in No. 84–1567, p. ii.

Both the Trustees and Woodward Sand Co. invoked the appellate jurisdiction of this Court under 28 U. S. C. § 1253. We noted probable jurisdiction, 472 U. S. —— (1985), and now affirm.

II

Appellants challenge the District Court's conclusion that the Act does not effect a taking of "property" within the meaning of the Fifth Amendment. Rather than specifically asserting that the contractual limitation of liability is property, however, appellants argue that the imposition of noncontractual withdrawal liability violates the Taking Clause of the Fifth Amendment by requiring employers to transfer their assets for the private use of pension trusts and, in any event, by requiring an uncompensated transfer.[7]

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[6] The three-judge court also rejected appellants' arguments that the MPPAA violated due process, the Contract Clause, and several other constitutional provisions. See App. to Juris. Statement in No. 84-1555, pp. 8-14.

The panel's decision upholding the constitutionality of the MPPAA is consistent with the result reached by every other court to have considered the issue. *Keith Fulton & Sons, Inc.* v. *New England Teamsters and Trucking Industry Pension Fund*, 762 F. 2d 1124 (CA1 1984), modified on other grounds, 762 F. 2d 1137 (CA1 1985); *Board of Trustees of Western Conference of Teamsters Pension Trust Fund* v. *Thompson Building Materials, Inc.*, 749 F. 2d 1396 (CA9 1984), cert. denied, 471 U. S. —— (1985); *Terson Co.* v. *Bakery Drivers and Salesmen Local 194*, 739 F. 2d 118 (CA3 1984); *Washington Star Co.* v. *International Typographical Union Negotiated Pension Plan*, 729 F. 2d 1502 (CADC 1984); *Textile Workers Pension Fund* v. *Standard Dye & Finishing Co.*, 725 F. 2d 843 (CA2), cert. denied, *sub nom. Sibley, Lindsay & Curr Co.* v. *Bakery, Confectionary & Tobacco Workers*, 467 U. S. 1259 (1984); *Peick* v. *Pension Benefit Guaranty Corporation*, 724 F. 2d 1247 (CA7 1983), cert. denied, 467 U. S. 1259 (1984); *Republic Industries, Inc.* v. *Teamsters Joint Council No. 83 of Virginia Pension Fund*, 718 F. 2d 628 (CA4 1983), cert. denied, 467 U. S. 1259 (1984). *Dorn's Transportation, Inc.* v. *I. A. M. National Pension Fund Benefit Plan*, 578 F. Supp. 1222 (D DC 1984), affirmed, 753 F. 2d 166 (CADC 1985); *Speckmann* v. *Paddock Chrysler Plymouth, Inc.*, 565 F. Supp. 469 (ED Mo. 1983). In *Keith Fulton, Thompson Building Materials, Terson, Peick, Republic Industries, Dorn*, and *Speckman*, the Taking Clause claim was directly at issue.

We agree that an employer subject to withdrawal liability is permanently deprived of those assets necessary to satisfy its statutory obligation, not to the Government, but to a pension trust. If liability is assessed under the Act, it constitutes a real debt that the employer must satisfy, and it is not an obligation which can be considered insubstantial. In the present litigation, for example, appellant Woodward Sand Co.'s withdrawal liability, after the PBGC assessment was reduced by an arbitrator, was approximately $200,000, or nearly 25% of the firm's net worth. Juris. Statement in No. 84-1567, p. 7, n. 7.

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[7] Appellant Trustees make two additional arguments as well. First, they argue that if the imposition of withdrawal liability is invalid under the Taking Clause, then the related provisions of the MPPAA requiring multiemployer plans to pay premiums to the PBGC are also invalid, as they are inseverable from the overall statutory scheme. Second, the Trustees contend that the statutory provisions requiring multiemployer plans to pay premiums to the PBGC and authorizing the PBGC to use the funds "in its discretion" to pay benefits to participants of a terminated multiemployer plan violate the principle of separation of powers by delegating legislative authority to the PBGC.

Because we find that the withdrawal liability provisions of the Act are valid under the Taking Clause, we need not address the Trustees' first assertion. As to the Trustees' separation of powers contention, we find little merit in this argument. 29 U. S. C. § 1381(c)(2)(B) (1976 ed.) stated that the PBGC was to pay benefits if it determined "that the payment . . . of benefits guaranteed under [ERISA] with respect to that plan [would] not jeoparidze the payments the [PBGC] anticipate[d] it may be required to make in connection with [the mandatory guarantee program.]" Congress delegated discretionary, rather than mandatory, coverage for multiemployer plans prior to 1980 because it needed "time for thorough consideration of the complex issues posed by the termination of multiemployer pension plans." *Pension Benefit Guaranty Corporation* v. *Gray*, 467 U. S. 717, 721, n. 1 (1984). In these circumstances, the delegation of discretionary authority was a reasonable means of achieving congressional aims, and we are not persuaded that Congress failed to provide a clear "intelligible principle" to guide the PBGC in the exercise of this authority under the Act. See *J. W. Hampton, Jr., & Co.* v. *United States*, 276 U. S. 394, 409 (1928).

But appellants' submission—that such a statutory liability to a private party always constitutes an uncompensated taking prohibited by the Fifth Amendment—if accepted, would prove too much. In the course of regulating commercial and other human affairs, Congress routinely creates burdens for some that directly benefit others. For example, Congress may set minimum wages, control prices, or create causes of actions that did not previously exist. Given the propriety of the governmental power to regulate, it cannot be said that the Taking Clause is violated whenever legislation requires one person to use his or her assets for the benefit of another. In *Usery* v. *Turner Elkhorn Mining Co.*, 428 U. S. 1 (1976), we sustained a statute requiring coal mine operators to compensate former employees disabled by pneumoconiosis, even though the operators had never contracted for such liability, and the employees involved had long since terminated their connection with the industry. We said that "our cases are clear that legislation readjusting rights and burdens is not unlawful solely because it upsets otherwise settled expectations. . . . This is true even though the effect of the legislation is to impose a new duty or liability based on past acts." *Id.*, at 15-16 (citations omitted).

Relying on *Turner Elkhorn*, we also rejected a due process attack on the imposition, under the statute now before us, of withdrawal liability on employers who withdrew before the effective date of the 1978 amendments. We held that Congress had acted within its powers and for sound reasons. *Pension Benefit Guaranty Corporation* v. *R. A. Gray & Co.*, 467 U. S. 717 (1984). Although both *Gray* and *Turner Elkhorn* were due process cases, it would be surprising indeed to discover now that in both cases Congress unconstitutionally had taken the assets of the employers there involved.

Appellants' claim of an illegal taking gains nothing from the fact that the employer in the present litigation was protected by the terms of its contract from any liability beyond the specified contributions to which it had agreed. See nn. 2, 3, *supra.* "Contracts, however express, cannot fetter the constitutional authority of Congress. Contracts may create rights of property, but when contracts deal with a subject matter which lies within the control of Congress, they have a congenital infirmity. Parties cannot remove their transactions from the reach of dominant constitutional power by making contracts about them." *Norman* v. *Baltimore & Ohio R. Co.*, 294 U. S. 240, 307–308 (1935).

If the regulatory statute is otherwise within the powers of Congress, therefore, its application may not be defeated by private contractual provisions. For the same reason, the fact that legislation disregards or destroys existing contractual rights does not always transform the regulation into an illegal taking. *Bowles* v. *Willingham*, 321 U. S. 503, 517 (1944); *Omnia Commercial Co.* v. *United States*, 261 U. S. 502, 508–510 (1923). This is not to say that contractual rights are never property rights or that the Government may always take them for its own benefit without compensation. But here, the United States has taken nothing for its own use, and only has nullified a contractual provision limiting liability by imposing an additional obligation that is otherwise within the power of Congress to impose. That the statutory withdrawal liability will operate in this manner and will redound to the benefit of pension trusts does not justify a holding that the provision violates the Taking Clause and is invalid on its face.

This conclusion is not inconsistent with our prior Taking Clause cases. See *e. g.*, *Ruckelshaus* v. *Monsanto Co.*, 467 U. S. 986 (1984); *Loretto* v. *Teleprompter Manhattan CATV Corp.*, 458 U. S. 419 (1982); *Hodel* v. *Virginia Surface Mining & Reclamation Assn.*, 452 U. S. 264 (1981); *Kaiser Aetna* v. *United States*, 444 U. S. 164 (1979); *Penn Central Transportation Co.* v. *New York City*, 438 U. S. 104 (1978). In all of these cases, we have eschewed the development of any set formula for identifying a "taking" forbidden by the Fifth Amendment, and have relied instead on ad hoc, factual inquiries into the circumstances of each particular case. *Monsanto Co., supra,* at ——; *Kaiser Aetna, supra,* at 175. To aid in this determination, however, we have identified three factors which have "particular significance:" (1) "the economic impact of the regulation on the claimant"; (2) "the extent to which the regulation has interfered with distinct investment-backed expectations"; and (3) "the character of the governmental action." *Penn Central Transportation Co., supra,* at 124. Accord *Monsanto Co., supra,* at ——; *PruneYard Shopping Center* v. *Robins,* 447 U. S. 74, 82–83 (1980). Examining the MPPAA in light of these factors reinforces our belief that the imposition of withdrawal liability does not constitute a compensable taking under the Fifth Amendment.

First, with respect to the nature of the governmental action, we already have noted that, under the Act, the Government does not physically invade or permanently appropriate any of the employer's assets for its own use. Instead, the Act safeguards the participants in multiemployer pension plans by requiring a withdrawing employer to fund its share of the plan obligations incurred during its association with the plan. This interference with the property rights of an employer arises from a public program that adjusts the benefits and burdens of economic life to promote the common good and, under our cases, does not constitute a taking requiring Government compensation. *Penn Central Transportation Co., supra,* at 124; *Usery* v. *Turner Elkhorn Mining Co., supra,* at 15, 16. See *Andrus* v. *Allard,* 444 U. S. 51, 65 (1979); *Pennsylvania Coal Co.* v. *Mahon,* 260 U. S. 393, 413 (1922).

Next, as to the severity of the economic impact of the MPPAA, there is no doubt that the Act completely deprives an employer of whatever amount of money it is obligated to pay to fulfill its statutory liability. The assessment of withdrawal liability is not made in a vacuum, however, but directly depends on the relationship between the employer and the plan to which it had made contributions. Moreover, there are a significant number of provisions in the Act that moderate and mitigate the economic impact of an individual employer's liability.[8] There is nothing to show that the withdrawal liability actually imposed on an employer will always be out of proportion to its experience with the plan, and the mere fact that the employer must pay money to comply with the Act is but a necessary consequence of the MPPAA's regulatory scheme.

The final inquiry suggested for determining whether the Act constitutes a "taking" under the Fifth Amendment is whether the MPPAA has interfered with reasonable investment-backed expectations. Appellants argue that the only monetary obligations incurred by each employer involved in the Operating Engineers Pension Plan arose from the specific terms of the Plan and Trust Agreement between the employers and the union, and that the imposition of withdrawal liability upsets those reasonable expectations. Pension plans, however, were the objects of legislative concern long before the passage of ERISA in 1974, and surely as of that time, it was clear that if the PBGC exercised its discretion to pay benefits upon the termination of a multiemployer pension plan, employers who had contributed to the plan during the preceeding five years were liable for their proportionate share of the plan's contributions during that period. 29 U. S. C. § 1364. It was also plain enough that the purpose of imposing withdrawal liability was to ensure that employees would receive the benefits promised them. When it became evident that ERISA fell short of achieving this end, Congress adopted the 1980 amendments. Prudent employers then had more than sufficient notice not only that pension plans were currently regulated, but also that withdrawal itself might trigger additional financial obligations. See *Gray*, 467 U. S., at ——. "Those who do business in the regulated field cannot object if the legislative scheme is buttressed by subsequent amendments to achieve the legislative end." *F. H. A.* v. *The Darlington, Inc.*, 358 U. S. 84, 91 (1958). See also *Usery* v. *Turner Elkhorn Mining Co.*, 428 U. S., at 15–16 and cases cited therein.

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[8] Several sections of the Act moderate the impact of a withdrawing employer's liability by exempting certain transactions from being characterized as "withdrawals." See e. g., 29 U. S. C. §§ 1383(b), (c) (applying special definitions for determining whether there has been a complete or partial withdrawal from a pension plan in the building and construction industry and in the entertainment industry); § 1384 (cessation or reduction of contribution obligations as a result of an employer's assets do not result in a withdrawal, provided certain other conditions are met); § 1398(1) (change of corporate structure where successor continues to contribute to plan is not a withdrawal); § 1398(2) (withdrawal does not occur where employer suspends contributions to plan during labor dispute involving its employees).

Other sections reduce the size of the financial liability in various instances. See *e. g.*, 29 U. S. C. § 1389(a) (creating a *de minimis* rule which eliminates withdrawal liability entirely for an employer whose obligation would be equal to or less than the smaller of 1) ¾ of 1 percent of the plan's unfunded vested obligations; or 2) $50,000); § 1405(a)(1) (limiting withdrawal liability for employer who liquidates his business); § 1390(a)(2) (establishing a "free look" provision, whereby new employers may withdraw without liability if it had an obligation to contribute for no more than six consecutive plan years, or, if shorter, the number of years required for vesting under the plan).

The purpose of forbidding uncompensated takings of private property for public use is "to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong* v. *United States*, 364 U. S. 40, 49 (1960). We are far from persuaded that fairness and justice require the public, rather than the withdrawing employers and other parties to pension plan agreements, to shoulder the responsibility for rescuing plans that are in financial trouble. The employers in the present litigation voluntarily negotiated and maintained a pension plan which was determined to be within the strictures of ERISA. We do not know, as a fact, whether this plan was underfunded, but Congress determined that unregulated withdrawals from multiemployer plans could endanger their financial vitality and deprive workers of the vested rights they were entitled to anticipate would be theirs upon retirement. For this reason, Congress imposed withdrawal liability as one part of an overall statutory scheme to safeguard the solvency of private pension plans. We see no constitutionally compelled reason to require the Treasury to assume the financial burden of attaining this goal.

The judgment of the three-judge court is

Affirmed.

SUPREME COURT OF THE UNITED STATES

Nos. 84-1555 AND 84-1567

JOHN L. CONNOLLY, ET AL., ETC., APPELLANTS
84-1555 *v.*
PENSION BENEFIT GUARANTY CORPORATION,
ETC., ET AL.

WOODWARD SAND COMPANY, INC., APPELLANT
84-1567 *v.*
PENSION BENEFIT GUARANTY CORPORATION,
ETC., ET AL.

ON APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA

[February 26, 1986]

JUSTICE O'CONNOR, with whom JUSTICE POWELL joins, concurring.

Today the Court upholds the withdrawal liability provisions of the Multiemployer Pension Plan Amendments Act of 1980 (MPPAA) against a facial challenge to their validity based on the Taking Clause of the Fifth Amendment. I join the Court's opinion and agree with its reasoning and its result, but I write separately to emphasize some of the issues the Court does *not* decide today. Specifically, the Court does not decide today, and has left open in previous cases, whether the imposition of withdrawal liability under the MPPAA and of plan termination liability under the Employee Retirement Income Security Act of 1974 (ERISA) may in some circumstances be so arbitrary and irrational as to violate the Due Process Clause of the Fifth Amendment. See *Pension Benefit Retirement Corporation* v. *Gray*, 467 U. S. 717, 728, n. 7 (1984); *Nachman Corp.* v. *Pension Benefit Guaranty Corp.*, 446 U. S. 359, 367-368 (1980). The Court also has no occasion to decide whether the MPPAA may violate the Taking Clause as applied in particular cases, or whether the pension plan in this case is a defined benefit plan rather than a defined contribution plan within the meaning of ERISA.

As the Court indicates, the mere fact that "legislation requires one person to use his or her assets for the benefit of another," *ante*, at ——, will not establish either a violation of the Taking Clause or the Due Process Clause. With regard to the latter provision, it is settled that in the field of economic legislation "the burden is on one complaining of a due process violation to establish that the legislature has acted in an arbitrary and irrational way." *Usery* v. *Turner Elkhorn Mining Co.*, 428 U. S. 1, 15 (1976). Nonetheless, the Court has never intimated that Congress possesses unlimited power to "readjus[t] rights and burdens . . . [and] upse[t] otherwise settled expectations." *Turner Elkhorn, supra*, at 16. Our recent cases leave open the possibility that the imposition of retroactive liability on employers for the benefit of employees may be arbitrary and irrational in the absence of any connection between the employer's conduct and some detriment to the employee. See *Turner Elkhorn, supra*, at 19, 24–26; *Pension Benefit Guaranty Corporation* v. *Gray*, *supra*, at —— (discussing *Railroad Retirement Board* v. *Alton R. Co.*, 295 U. S. 330 (1935)).

Insofar as the application of the provisions of the MPPAA and of ERISA to pension benefits that accrue in the future is concerned, there can be little doubt of Congress' power to override contractual provisions limiting employer liability for unfunded benefits promised to employees under the plan. But both statutes impose liability under certain circumstances on contributing employers for unfunded benefits that accrued in the past under a pension plan whether or not the employers had agreed to ensure that benefits would be fully funded. In my view, imposition of this type of retroactive liability on employers, to be constitutional, must rest on some basis in the employer's conduct that would make it rational to treat the employees' expectations of benefits under the plan as the employer's responsibility.

In enacting ERISA, Congress distinguished between two types of employee retirement benefit plans: "defined benefit plan[s]" and "defined contribution plan[s]," also known as "individual account plan[s]." See 29 U. S. C. §§1002(34), (35). An employer is subject to plan termination liability under ERISA only if the employee benefit plan to which the employer has contributed is covered by ERISA's plan termination insurance program, which applies to defined benefit plans but not to defined contribution plans. 29 U. S. C. §1321(b)(1). See *Nachman Corp.* v. *Pension Benefit Guaranty Corp.*, 446 U. S. 359, 363, n. 5 (1980). Congress exempted defined contribution plans from ERISA's termination insurance program because a defined contribution plan does not specify benefits to be paid, but instead establishes an individual account for each participant to which employer contributions are made. 29 U. S. C. §1002(34). "[U]nder such plans, by definition, there can never be an insufficiency of funds in the plan to cover promised benefits." *Nachman Corp.*, *supra*, at 364, n. 5.

By contrast, whenever a plan defines the benefits payable thereunder, the possibility exists that at a given time plan assets will fall short of the present value of vested plan benefits. Congress therefore subjected defined benefit plans to ERISA's plan termination insurance program, and did so by broadly defining a defined benefit plan as "a pension plan other than an individual account plan." 29 U. S. C. §1002(35). We have no occasion today to decide whether this definition sweeps in all plans in which the benefits to be received by employees are fixed by the terms of the plan, even if the plan also provides that the employer's contributions shall be fixed and shall not be adjusted to whatever level would be required to provide those benefits. Indeed, this case began in part as a challenge by the Trustees of the

Operating Engineers Pension Plan to a determination by Pension Benefit Guaranty Corporation (hereinafter PBGC) that the Pension Plan is a defined benefit plan. See *ante*, at ——. That challenge was resolved against the Trustees and is not presented here.

ERISA's broad definition of defined benefit plan may well mean that Congress imposed contingent liability on contributing employers without regard to the extent of a particular employer's actual responsibility for the existence of a plan's promise of fixed benefits to employees and without regard to the extent to which any such promise was conditioned—and understood by employees to be conditioned—by plan provisions limiting the employer's obligations to make contributions to the plan. If so, the application of ERISA may in some circumstances raise constitutional doubts under the Taking Clause or the Due Process Clause.

The same doubts arise with respect to the imposition of withdrawal liability under the MPPAA, which is properly seen as a prophylactic extension of the liability initially imposed by ERISA. Withdrawal liability is intended to ensure that "an employer withdrawing from a multiemployer plan w[ill] . . . complete funding its fair share of the plan's unfunded liabilities," *Gray*, *supra*, at 723, n. 3 (quoting Pension Plan Termination Insurance Issues: Hearings Before the Subcommittee on Oversight of the House Committee on Ways and Means, 95th Cong., 2d Sess., 23 (1978) (statement of Matthew M. Lind, Executive Director of PBGC), and thus presupposes that employers can be made liable for those unfunded liabilities in the first instance. Although the MPPAA substitutes liability to the plan for liability to PBGC, the withdrawal liability it imposes on employers who contribute to multi-employer plans reflects the same apparent determination to treat all definite benefits as promises for which the employer can be held liable that underlies termination liability under ERISA. PBGC coverage of a multi-employer plan continues to turn on whether it is a defined benefit plan, and the MPPAA defines the withdrawing employer's liability to the plan in terms of "unfunded vested benefits," 29 U. S. C. § 1391, thereby making withdrawal liability turn on the presence of fixed benefits. The MPPAA's termination liability provisions are complex, but their overall effect is also to hold employers liable for underfunding of vested fixed benefits. See 29 U. S. C. § 1341a. Thus, it is evident that the MPPAA expands on Congress' decision in ERISA to exempt only defined contribution plans, narrowly defined, from PBGC coverage and employer liability. Whether the employer's liability is to PBGC or to the plan, the thrust of both statutes is to enforce the plan's promise of fixed benefits against the employer with respect to benefits already accrued.

The degree to which an employer can be said to be responsible for the promise of benefits made by a plan varies dramatically across the spectrum of plans. Where a single employer has unilaterally adopted and maintained a pension plan for its employees, the employer's responsibility for the presence of a promise to pay defined benefits is direct and substantial. The employer can nominate all the plan's trustees and enjoys wide discretion in designing the plan and determining the level of benefits. Where such a plan holds out to employees a promise of definite benefits, and where employees have rendered the years of service required for benefits to accrue and vest, it seems entirely rational to hold the employer liable for any shortfall in the plan's assets, even if the plan's provisions purport to limit the employer's liability in the event of underfunding upon plan termination.

Where a pension plan is established through collective bargaining between one or more employers and a union, matters may be different. Such plans, commonly known as "Taft-Hartley" plans, were authorized by § 302(c)(5) of the Labor Management Relations Act of 1947 (LMRA), 61 Stat. 157, codified as amended at 29 U. S. C. § 186(c)(5). Taft-Hartley plans are the product of joint negotiation between employers and a union representing employees and are administered by trustees nominated in equal numbers by employers and the union. *Ibid.* Unlike typical defined benefit plans, which call for variable employer contributions and provide for fixed benefits, most Taft-Hartley plans "possess the characteristics of both fixed contributions and fixed benefits." J. Melone, Collectively Bargained Multi-Employer Pension Plans 20 (1963) (hereinafter Melone). As PBGC has explained:

> "Employers participating in multiemployer plans are generally required to contribute at a fixed rate, specified in the collective bargaining agreement. . . . Traditionally, the multiemployer plan or the bargaining agreement have limited the employer's contractual obligation to contribute at the fixed rate, whether or not the contributions were sufficient to provide the benefits established by the joint board or the collectively bargained agreement." PBGC—Multiemployer Study Required by P. L. 95–214 (1978) p. 22 (hereinafter Multiemployer Study).

See also Melone 50; Goetz, Developing Federal Labor Law of Welfare and Pension Plans, 55 Cornell L. Rev. 911, 931 (1970).

Under these hybrid Taft-Hartley plans it is the plan's trustees, not the employers and the union, who are "usually responsible for determining the types of benefits to be provided . . . and the level of benefits, although in some cases these are set in the collective bargaining agreement." Multiemployer Study 22 (footnote omitted). See also Report to the Congress by the Comptroller General of the United States, Effects of the Multiemployer Pension Plan Amendments Act on Plan Participants' Benefits, GAO–HRD–85–58 at App. I, Table 3 (June 14, 1985) (95% of 139 multiemployer plans surveyed provided that trustees set benefits) (hereinafter Report to the Congress). This delegation of responsibility to the trustees may well stem from an understanding on the part of employers and unions that under the fixed-contribution approach the plan rather than the employers would bear the risks of adverse experience and the benefits of favorable experience in the first instance. See Pension Plans Under Collective Bargaining: A Reference Guide for Trade Unions 64 (American Federation of Labor 1953). If the actuary's earnings assumptions proved too conservative, the plan would have excess assets that could be used to support an increase in benefits by the trustees, and if asset growth was lower than anticipated, benefits could be reduced. It now appears that Taft-Hartley plan employers will be liable for such experience losses in many cases, even where withdrawal occurs as a result of events over which an employer has no control, and even though experience gains can still ordinarily be used to increase benefits.

It is also noteworthy that, as this Court held in *NLRB* v. *Amax Coal Co.*, 453 U. S. 322, 331–332 (1981), "the duty of the management-appointed trustee of an employee benefit fund under § 302(c)(5) is directly antithetical to that of an agent of the appointing party." ERISA conclusively established that "an employee benefit fund trustee is a fiduciary whose duty to the trust beneficiaries must overcome any loyalty to the interest of the party that appointed him." *Id.*, at 334. In light of these fiduciary duties, it seems remarkable to impute responsibility to employers for the level of benefits promised by the plan and set by the joint board of trustees, notwithstanding the express limits on employer liability contained in the plan and agreed to in collective bargaining.

Yet that would appear to be what Congress may have done to the extent a Taft-Hartley plan such as the pension plan in this case is treated as a pure defined benefit plan in which the employer promised to make contributions to the extent necessary to fund the fixed benefits provided in the plan. As Representative Erlenborn put it in the hearings on the MPPAA:

> "[W]e have taken something that neither looked like a duck, or walked like a duck, or quacked like a duck, and we passed a law [ERISA] and said, 'It is a duck.' If it is that easy, I suppose we can repeal the law of gravity and solve our energy problem. It is treating the multiemployer plans where you negotiate a *contribution* as having put a legal obligation on the employer to reach a level of *benefits* that has caused the problem." Hearings on H. R. 3904 before the Task Force on Welfare and Pension Plans of the Subcommittee on Labor-Management Relations of the Committee on Education and Labor, House of Representatives, 96th Cong., 391 (1980) (emphasis added).

The foregoing observations suggest to me that whatever promises a collectively bargained plan makes with respect to benefits may not always be rationally traceable to the employer's conduct and that it may sometimes be quite fictitious to speak of such plans as "promising" benefits at a specified level, since to do so ignores express and bargained-for conditions on those promises. Where the plan's fixed-contribution aspects were agreed to by employees through their exclusive bargaining representatives, and where employers had no control over the level of benefits promised, employer responsibility for the benefits specified by the plan is very much attenuated, and employee expectations that those benefits will in all events be paid, in the face of plan language to the contrary, are not easily traceable to the employer's conduct.

The possible arbitrariness of imposing termination and withdrawal liability on some employers contributing to fixed-cost Taft-Hartley plans may be heightened in particular cases. For example, an employer who agrees to participate in a multiemployer plan long after the plan's benefit structure has been determined may have had no say whatever in establishing critical features of the plan that determine the level of benefits and the value of those benefits. Similarly, if a plan

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had regularly undergone increases and reductions in accrued benefits prior to ERISA, any contention that employers caused employees to rely on a promise of fixed benefits might carry even less weight.

Beyond that, the withdrawal provisions of the MPPAA are structured in a manner that may lead to extremely harsh results. For example, it appears that even if the trustees raised benefits for both retired and current employees during the period immediately prior to an employer's withdrawal, the withdrawing employer can be held liable for the resulting underfunding. Such benefit increases are not uncommon. See Report to the Congress, 43, App. I, Table 17 (68% of multiemployer plans surveyed increased benefits for working participants during 33 months prior to enactment of the MPPAA); Table 18 (46% of these plans increased retirees' benefits during the same period). In addition, the presumptive method for calculating employer withdrawal liability is based on the employer's proportionate share of the *contributions* made to the plan during the years in which the employer participated. 29 U. S. C. § 1391(b). As a result, because fixed-contribution plans typically do not set each employer's contributions on the basis of the value of the benefits accrued by that employer's employees, it seems entirely possible that an employer may be liable to the plan for substantial sums even though that employer's contributions plus its allocable share of plan earnings *exceed* the present value of all benefits accrued by its employees.

To be sure, the Court does not address these questions today. Since this case involves only a facial challenge under the Taking Clause to the MPPAA's withdrawal liability provisions, the Court properly refuses to look into the possibility that harsh results such as those I have noted may affect its analysis, let alone a due process inquiry, when the MPPAA is applied in particular cases. I write only to emphasize some of the issues the Court does not decide today, and to express the view that termination liability under ERISA, and withdrawal liability under the MPPAA, impose substantial retroactive burdens on employers in a manner that may drastically disrupt longstanding expectations, and do so on the basis of a questionable rationale that remains open to review in appropriate cases.

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(Slip Opinion)

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Lumber Co.*, 200 U. S. 321, 337.

ORIGINAL

SUPREME COURT OF THE UNITED STATES

Syllabus

HOLBROOK, SUPERINTENDENT, MASSACHUSETTS CORRECTIONAL INSTITUTION, ET AL. *v.* FLYNN

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

No. 84–1606. Argued January 14, 1986—Decided March 26, 1986

After respondent and others were indicted for armed robbery in Rhode Island Superior Court, they were held without bail. When the trial was about to begin, four uniformed state troopers were sitting in the front row of the spectators' section of the courtroom to supplement the customary security force, which was overextended at the time. Respondent's counsel objected to the troopers' presence, but this objection was overruled by the trial justice, primarily on the basis of *voir dire* responses during the selection of the jury indicating that the troopers' presence would not affect the defendants' ability to receive a fair trial. Respondent was convicted, and the Rhode Island Supreme Court affirmed. Respondent then brought a habeas corpus proceeding in Federal District Court, which also rejected his objections to the troopers' presence. The Court of Appeals reversed, holding that the trial justice had failed to consider whether the particular circumstances of respondent's trial had called for the troopers' presence and that the justice had improperly relied on the jurors' *voir dire* responses to rebut any suggestion of prejudice to respondent.

Held: The troopers' presence at respondent's trial was not so inherently prejudicial that he was thereby denied his constitutional right to a fair trial. Pp. 6–12.

(a) While an accused is entitled to have his guilt or innocence determined solely on the basis of evidence introduced at trial, this does not mean that every practice tending to single out an accused from everyone else in the courtroom must be struck down. Pp. 6–8.

(b) The conspicuous, or at least noticeable, presence of guards in a courtroom during trial is not the sort of inherently prejudicial practice that should be permitted only where justified by an essential state inter-

Syllabus

est. Such presence need not be interpreted as a sign that the defendant is particularly dangerous or culpable. Jurors may just as easily believe that the guards are there to prevent outside disruptions or eruptions of violence in the courtroom. Reason, principle, and human experience counsel against a presumption that any use of identifiable guards in a courtroom is inherently prejudicial. In view of the variety of ways in which such guards can be deployed, a case-by-case approach is more appropriate. Pp. 8–9.

(c) Whenever a courtroom arrangement is challenged as inherently prejudicial, the question is not whether the jurors articulated a consciousness of some prejudicial effect, but rather whether there was an unacceptable risk of prejudice. In this case, there is no justification for finding such an unacceptable risk based on the troopers' presence. Even if the jurors had been aware that the deployment of troopers was not common practice, there is no reason to believe that the troopers' presence tended to brand respondent with guilt. Their presence was unlikely to have been taken as a sign of anything other than a normal official concern for safety and order. Moreover, even if a slight degree of prejudice could be attributed to the troopers' presence, sufficient cause for their presence could be found in the State's need to maintain custody over defendants who had been denied bail. The troopers' presence was intimately related to the State's legitimate interest in maintaining such custody and thus did not offend the Equal Protection Clause by arbitrarily discriminating against those unable to post bail or to whom bail has been denied. Pp. 9–11.

(d) Since this case involves a federal court's review of a constitutional challenge to a state-court proceeding, the federal court's task is not to determine whether it might have been feasible for the State to have employed less conspicuous security measures in the courtroom, but only whether what the jurors saw was so inherently prejudicial as to pose an unacceptable threat to the defendants' right to a fair trial. Respondent has failed to show the existence of such inherent prejudice and has not shown actual prejudice. Pp. 11–12.

749 F. 2d 961, reversed.

MARSHALL, J., delivered the opinion for a unanimous Court. BURGER, C. J., filed a concurring opinion.

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D. C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

No. 84-1606

TERRANCE HOLBROOK, SUPERINTENDENT, MASSACHUSETTS CORRECTIONAL INSTITUTION, NORFOLK, MASSACHUSETTS, ET AL., PETITIONERS *v.* CHARLES FLYNN

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

[March 26, 1986]

JUSTICE MARSHALL delivered the opinion of the Court.

The question presented in this case is whether a criminal defendant was denied his constitutional right to a fair trial when, at his trial with five codefendants, the customary courtroom security force was supplemented by four uniformed state troopers sitting in the first row of the spectator section.

I

On August 14, 1975, nine masked men entered the Bonded Vault Co. in Providence, Rhode Island, robbed several employees at gunpoint, broke into most of the safe-deposit boxes in the vault, and escaped with approximately $4 million in cash and valuables. In January 1976, respondent and eight others were indicted in Providence County Superior Court for that crime. After a hearing in Superior Court, respondent and five of his alleged accomplices were ordered held without bail in the custody of the Warden of the State's Adult Correctional Institution.[1]

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[1] Of the remaining three defendants, two were fugitive at the time of respondent's trial, and the third appeared at that proceeding as a witness for the State.

In April 1976, respondent and his five codefendants were brought to trial in Superior Court before Associate Justice Anthony A. Giannini. Upon entering the courtroom, respondent's counsel noted the presence of four uniformed state troopers, sitting in the first row of the spectators' section; the officers were not far behind, but were separated by the "bar" from the seats assigned to the defendants for the duration of the trial.[2] Counsel immediately complained to the judge that "the defendants would object to uniformed police, uniformed state police, sitting in the court as a display of 'strength' in the presence of the jury." Tr. 48–49. While counsel observed that he would have no objection to the use of any number of plainclothed security personnel, he argued that the presence of uniformed officers would suggest to the jury that defendants were of "bad character." *Id.*, at 48. Justice Giannini replied that the troopers were present because the Committing Squad, which usually supplied courtroom security personnel in such cases, was overextended at that time. Noting that he had not personally requested the assistance of the troopers, the judge agreed to see whether they might be made to wear civilian clothes for their future appearances in the courtroom.

The following week, Justice Giannini announced that he had "received a report that it is not practical, both from an organization point of view and also from a contractual point of view with the union representing the state troopers," for the four troopers to dress in civilian clothes. *Id.*, at 71. In the face of these constraints and in view of the need for adequate security, the judge ruled that the troopers could remain in the courtroom, in full uniform. He noted that because the troopers would be seated behind the bar, defendants would in no way be prejudiced. The next day, denying defendants' motion for reconsideration, Justice Giannini asserted that though he himself had not made the decision to deploy the troopers, he thought defendants "overly sensitive" to the danger of prejudice. *Id.*, at 84. At any rate, the judge went on, an examination of prospective jurors would reveal whether they were likely to draw adverse inference from the troopers' presence, and would thereby guarantee the rights of the defendants. Jury selection began.

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[2] Although the record could have been clearer on this point, all the colloquies in the record corroborate the statement, made by respondent's counsel later in pretrial proceedings, that "sitting behind the defendants, taking the first row, vacating the first row where the spectators sit, are four uniformed state police guards, armed. . . ." Tr. 80; see *id.*, at 71–72. The troopers appear to have maintained this position throughout the course of the trial, although at times there might have been only three of them in the courtroom. See, *e. g.*, *Id.*, at 109, 146.

In the meantime, respondent sought interlocutory review in the Rhode Island Supreme Court of Justice Giannini's ruling. After initially declining review, the Supreme Court read a transcript of the ruling and granted respondent's petition. Noting that "[t]he presence of armed, uniformed police officers acting as a security force in criminal courtrooms in this jurisdiction is a departure from the practice usually found in the trial courts of this state," the court concluded: "The trial justice may not delegate responsibility that is his to the so-called security committee or its advisors. The presence of the State Police is a decision that must be resolved solely by the trial justice after consideration of all relevant factors." *State* v. *Byrnes*, 116 R. I. 925, 927, 357 A. 2d 448, 449 (1976).

Upon the State's request, Justice Giannini conducted a hearing at which the first witness was Captain Robert Melucci, the principal officer of the Committing Squad, the group charged with maintaining courtroom security during the trials of defendants in pretrial detention.[3] He testified that, because of other commitments in the courthouse, the force of 12 officers available for deployment in the building was insufficient to maintain the preferred ratio of 2 officers to every defendant in this 6-defendant trial. Since any ratio approaching one to one posed a "security risk," Tr. 120, and he could spare only six officers for respondent's trial, Captain Melucci had contacted the Superior Court's presiding justice and informed him of the need for additional security personnel. As a result, Captain Melucci testified, additional help had been sought from the State Police.

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[3] The name of the Committing Squad has been changed to "Rhode Island state marshals." 1976 R. I. Pub. Laws ch. 259, § 1 (codified at R. I. Gen. Laws § 42–56–3) (1984 reenactment).

The next witness, Major Lionel Benjamin, Executive Officer of the Rhode Island State Police, explained that any time his force was charged with transporting prisoners from the Adult Correctional Institution to the courthouse and maintaining custody during trial, he was contractually obligated to use officers from the uniformed division. That same contract with the Fraternal Order of Police, according to Major Benjamin, precluded him from asking members of the uniformed division to perform their duties in civilian clothing. The Major went on to note that even were there no contractual bar, the force's plainclothes detective division lacked the personnel to provide security for the duration of respondent's trial. He concluded by saying that if the court required his troopers to wear civilian clothes, he would withdraw them. *Id.*, at 161.

After completing jury selection, Justice Giannini gave his final ruling on respondent's motion. He noted that "if these defendants were admitted to bail, there would be no state policemen and there would be no committing squad officers in this courtroom." *Id.*, at 229. But bail having been denied, it became the responsibility of the warden and the Committing Squad to maintain custody of the detainees. The judge found that because the Committing Squad lacked the resources, the necessary level of security could be ensured only with the help of the uniformed troopers. Having held the presence of the troopers "justified by the evidence," Justice Giannini considered whether the presence of the troopers had prejudiced the defendants. He observed that of the 54 prospective jurors who had not been struck before they were asked about the troopers, 51 had responded that the troopers' presence "created no inference of guilt with regard to the defendants in their mind"; the remaining three had not precisely addressed the question. *Id.*, at 230–231. When asked to speculate why the troopers were present, many had given vague response as to the need for security. In view of the *voir dire* responses, the judge concluded that the presence of the troopers would not affect defendants' ability to receive a fair trial.

The trial lasted more than two months and ended with verdicts acquitting three defendants and convicting respondent and two others. On appeal, the Rhode Island Supreme Court affirmed the convictions. With respect to respondent's objection to the troopers, the court concluded:

> "[T]he trial justice gave a reasoned and careful consideration of the issues raised by the presence of the uniformed troopers and, after consideration of all relevant factors, found that the presence of the troopers in no way prejudiced defendants. We have read the record, and we find no reason whatsoever to fault his conclusion." *State* v. *Byrnes*, 433 A. 2d 658, 663 (1981).

Respondent then brought this habeas proceeding in Federal District Court. After certain procedural complications not relevant here, the District Court for the District of Rhode Island entertained the petition and rejected all the claims therein. With respect to respondent's objection to the presence of the troopers throughout the trial, the court held: "Less totalitarian alternatives appear to have been explored and rejected on rational grounds. The security measures approved here, extreme though they might have been, did not, under the totality of the circumstances, deny due process or equal protection to the petitioner." 581 F. Supp. 990, 998 (1984).

The Court of Appeals, however, reversed this dismissal. 749 F. 2d 961 (CA1 1984). Seizing upon the Rhode Island Supreme Court's observation that the presence of uniformed and armed troopers had been an "extraordinary" event, the Court of Appeals concluded that Justice Giannini had failed to consider whether the particular circumstances of respondent's trial had called for such measures.

> "Rather, with no threats shown to safety, he balanced nothing, but simply indicated a fear that since the defendants had not been bailed, they might flee from the courtroom. There was no evidence even suggesting any unusual likelihood of this; nor had anything whatever made 'manifest' the 'necessity for heightened security.' As for the exploration of less 'totalitarian alternatives,' the exploration was limited, notwithstanding defendants' suggestions, to inquiring whether regular commitment officers were available without inconveniencing the Presiding Justice, and whether the union contract permitted the state police to appear out of uniform and unarmed." *Id.*, at 964.

Dismissing the trial judge's reliance on jurors' *voir dire* responses to rebut any suggestion of prejudice to respondent, the Court of Appeals asserted: "Even if all jurors had indicated an unreserved opinion that the troopers' presence would not affect them, such expression, on a case as extreme as this, where there was no need to rely on it, is totally unacceptable." *Id.*, at 965. The court ordered that the writ of habeas corpus be granted.

We granted certiorari, 472 U. S. —— (1985) and now reverse.

II

A

Central to the right to a fair trial, guaranteed by the Sixth and Fourteenth Amendments, is the principle that "one accused of a crime is entitled to have his guilt or innocence determined solely on the basis of the evidence introduced at trial, and not on grounds of official suspicion, indictment, continued custody, or other circumstances not adduced as proof at trial." *Taylor* v. *Kentucky*, 436 U. S. 478, 485 (1978). This does not mean, however, that every practice tending to single out the accused from everyone else in the courtroom must be struck down. Recognizing that jurors are quite aware that the defendant appearing before them did not arrive there by choice or happenstance, we have never tried, and could never hope, to eliminate from trial procedures every reminder that the State has chosen to marshal its resources against a defendant to punish him for allegedly criminal conduct. To guarantee a defendant's due process rights under ordinary circumstances, our legal system has instead placed primary reliance on the adversary system and the presumption of innocence. When defense counsel vigorously represents his client's interests and the trial judge assiduously works to impress jurors with the need to presume the defendant's innocence, we have trusted that a fair result can be obtained.

Our faith in the adversary system and in jurors' capacity to adhere to the trial judge's instructions has never been absolute, however. We have recognized that certain practices pose such a threat to the "fairness of the fact-finding process" that they must be subjected to "close judicial scrutiny." *Estelle* v. *Williams*, 425 U. S. 501, 503–504 (1976). Thus, in *Estelle* v. *Williams*, we noted that where a defendant is forced to wear prison clothes when appearing before the jury, "the constant reminder of the accused's condition implicit in such distinctive, identifiable attire may affect a juror's judgment." *Id.*, at 504–505. Since no "essential state policy" is served by compelling a defendant to dress in this manner, *id.*, at 505, this Court went no further and concluded that the practice is unconstitutional. This close scrutiny of inherently prejudicial practices has not always been fatal, however. In *Illinois* v. *Allen*, 397 U. S. 337 (1970), the Court emphasized that a defendant may be prejudiced if he appears before the jury bound and gagged. "Not only is it possible that the sight of shackles and gags might have a significant effect on the jury's feelings about the defendant, but the use of this technique is itself something of an affront to the very dignity and decorum of judicial proceedings that the judge is seeking to uphold." *Id.*, at 344. Yet the Court nonetheless observed that in certain extreme situations, "binding and gagging might possibly be the fairest and most reasonable way to handle" a particularly obstreperous and disruptive defendant. *Ibid.*

B

The first issue to be considered here is thus whether the conspicuous, or at least noticeable, deployment of security personnel in a courtroom during trial is the sort of inherently prejudicial practice that, like shackling, should be permitted only where justified by an essential state interest specific to each trial. We do not believe that it is.

The chief feature that distinguishes the use of identifiable security officers from courtroom practices we might find inherently prejudicial is the wider range of inferences that a juror might reasonably draw from the officers' presence. While shackling and prison clothes are unmistakable indications of the need to separate a defendant from the community at large, the presence of guards at a defendant's trial need not be interpreted as a sign that he is particularly dangerous or culpable. Jurors may just as easily believe that the officers are there to guard against disruptions emanating from outside the courtroom or to ensure that tense courtroom exchanges do not erupt into violence. Indeed, it is entirely possible that jurors will not infer anything at all from the presence of the guards. If they are placed at some distance from the accused, security officers may well be perceived more as elements of an impressive drama than as reminders of the defendant's special status. Our society has become inured to the presence of armed guards in most public places; they are doubtless taken for granted so long as their numbers or weaponry do not suggest particular official concern or alarm. See *Hardee* v. *Kuhlman*, 581 F. 2d 330, 332 (CA2 1978).

To be sure, it is possible that the sight of a security force within the courtroom might under certain conditions "create the impression in the minds of the jury that the defendant is dangerous or untrustworthy." *Kennedy* v. *Cardwell*, 487 F. 2d 101, 108 (CA6 1973), cert. denied, 416 U. S. 959 (1974). However, "reason, principle, and common human experience," *Williams*, *supra*, at 504, counsel against a presumption that any use of identifiable security guards in the courtroom is inherently prejudicial. In view of the variety of ways in which such guards can be deployed, we believe that a case-by-case approach is more appropriate.

III

A

The courtroom security force in this case consisted of four uniformed state troopers, two Deputy Sheriffs, and six Committing Squad officers. Though respondent does not concede that the deployment of the uniformed Committing Squad officers was proper, his focus at every stage of his habeas proceedings has been exclusively on the prejudice he attributes to the four state troopers. The only question we need answer is thus whether the presence of these four uniformed and armed officers was so inherently prejudicial that that respondent was thereby denied his constitutional right to a fair trial.

The Court of Appeals was correct to find that Justice Giannini's assessment of jurors' states of mind cannot be dispositive here. If "a procedure employed by the State involves such a probability that prejudice will result that it is deemed inherently lacking in due process," *Estes* v. *Texas*, 381 U. S. 532, 542–543 (1965), little stock need be placed in jurors' claims to the contrary. See *Sheppard* v. *Maxwell*, 384 U. S. 333, 351–352 (1966); *Irvin* v. *Dowd*, 366 U. S. 717, 728 (1961). Even though a practice may be inherently prejudicial, jurors will not necessarily be fully conscious of the effect it will have on their attitude toward the accused. This will be especially true when jurors are questioned at the very beginning of proceedings; at that point, they can only speculate on how they will feel after being exposed to a practice daily over the course of a long trial. Whenever a courtroom arrangement is challenged as inherently prejudicial, therefore, the question must be not whether jurors actually articulated a consciousness of some prejudicial effect, but rather whether "an unacceptable risk is presented of impermissible factors coming into play," *Williams*, 425 U. S., at 505.

We do not minimize the threat that a roomful of uniformed and armed policemen might pose to a defendant's chances of receiving a fair trial. See ABA Standards for Criminal Justice 15–3.1(c) (2d ed. 1980). But we simply cannot find an unacceptable risk of prejudice in the spectacle of four such officers quietly sitting in the first row of a courtroom's spectator section.[4] Even had the jurors been aware that the deployment of troopers was not common practice in Rhode Island, we cannot believe that the use of the the four troopers tended to brand respondent in their eyes "with an unmistakable mark of guilt." *Williams*, *supra*, at 518 (BRENNAN, J., dissenting). Cf. *Dorman* v. *United States*, 140 U. S. App. D. C. 313, 327, 435 F. 2d 385, 397 (1970) (greater danger of prejudice if jury aware that arrangements are extraordinary). Four troopers are unlikely to have been taken as a sign of anything other than a normal official concern for the safety and order of the proceedings. Indeed, any juror who for some other reason believed defendants particularly dangerous might well have wondered why there were only four armed troopers for the six defendants.

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[4] The only social science study to which respondent has pointed us addresses the effects of prison clothes and courtroom guards upon jury verdicts. Its tentative conclusion is that defendants clad in prison garb or accompanied by guards are more likely to be found guilty than unsupervised defendants wearing their own clothes. However, the study also found that favored treatment was accorded defendants who had *both* supervision *and* prison clothing. Fontaine & Kiger, The Effects of Defendant Dress and Supervision on Judgments of Simulated Jurors: An Exploratory Study, 2 Law and Human Behavior 63, 69–70 (1978). In view of these curious and concededly tentative results, we will, at least for now, rely on our own experience and common sense.

We note, moreover, that even were we able to discern a slight degree of prejudice attributable to the troopers' presence at respondent's trial, sufficient cause for this level of security could be found in the State's need to maintain custody over defendants who had been denied bail after an individualized determination that their presence at trial could not otherwise be ensured. Unlike a policy requiring detained defendants to wear prison garb, the deployment of troopers was intimately related to the State's legitimate interest in maintaining custody during the proceedings and thus did not offend the Equal Protection Clause by arbitrarily discriminating against those unable to post bail or to whom bail had been denied. See *Williams*, *supra*, at 505–506.

B

The Court of Appeals rejected as wholly inadequate the reasons advanced by state authorities and accepted by Justice Giannini to explain why the four uniformed troopers had to be present at respondent's trial. However, our task here is not to determine whether it might have been feasible for the State to have employed less conspicuous security measures in the courtroom. While, in our supervisory capacity, we might express a preference that officers providing courtroom security in federal courts not be easily identifiable by jurors as guards,[5] we are much more constrained when reviewing a constitutional challenge to a state court proceeding. All a federal court may do in such a situation is look at the scene presented to jurors and determine whether what they saw was so inherently prejudicial as to pose an unacceptable threat to defendant's right to a fair trial; if the challenged practice is not found inherently prejudicial and if the defendant fails to show actual prejudice, the inquiry is over. Respondent has failed to carry his burden here.

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[5] See, *e. g. United States* v. *Jackson*, 549 F. 2d 517, 526–527 (CA8), cert. denied, *sub nom. Muhammed* v. *United States*, 430 U. S. 985 (1977); *United States* v. *Clardy*, 540 F. 2d 439, 442–443 (CA9), cert. denied, 429 U. S. 963 (1976); *Kennedy* v. *Cardwell*, 487 F. 2d 101, 109 (CA6 1973), cert. denied, 416 U. S. 959 (1974). See also N. Dorsen & L. Friedman, Disorder in the Court 249 (1973).

The judgment of the Court of Appeals is

Reversed.

SUPREME COURT OF THE UNITED STATES

No. 84-1606

TERRANCE HOLBROOK, SUPERINTENDENT, MASSACHUSETTS CORRECTIONAL INSTITUTION, NORFOLK, MASSACHUSETTS, ET AL., PETITIONERS *v.* CHARLES FLYNN

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

[March 26, 1986]

CHIEF JUSTICE BURGER, concurring.

I write only to explain my reading of the Court's statement that "in our supervisory capacity, we *might* express a preference that officers providing courtroom security in federal courts not be easily identifiable by jurors as guards . . . ." *Ante*, at 11 (emphasis added). In joining the opinion, I interpret the Court's carefully qualified statement in this case—a state case—as containing no suggestion that federal officers providing security must doff their uniforms before entering federal courtrooms, and certainly none of the three cases the Court cites, *ante*, at 11 n. 5, would require any such arbitrary action. Moreover, the issue of what kind of security arrangements some might "prefer" is, of course, quite distinct from issues such as whether a federal defendant would become entitled to a new trial because of an alleged prejudicial effect of the security measures used at his trial. On this understanding, I join the Court's opinion.

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(Slip Opinion)

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Lumber Co.*, 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

PARSONS STEEL, INC., ET AL. *v.* FIRST ALABAMA BANK ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 84-1616. Argued December 3, 1985—Decided January 27, 1986

Petitioners sued respondents in an Alabama state court, alleging that respondent bank had fraudulently induced petitioner individuals to permit a third person to take control of a subsidiary of petitioner corporation and eventually to obtain complete ownership. Subsequently, the subsidiary was adjudicated an involuntary bankrupt. Petitioners then sued the bank in Federal District Court, alleging that the same conduct on the bank's part that was the subject of the state suit violated the Bank Holding Company Act (BHCA) amendments. The federal action went to trial before the state action, and the District Court granted judgment n. o. v. for the bank. The Court of Appeals affirmed. Thereafter, respondents pleaded a res judicata defense in the state action based on the federal judgment, but the Alabama court denied the defense. After the state complaint was amended to include a Uniform Commercial Code (UCC) claim that the bank's foreclosure sale of the subsidiary's assets was commercially unreasonable, the jury returned a verdict for damages in petitioners' favor. Respondents then returned to the District Court and filed an injunctive action against petitioners. Holding that the state fraud and UCC claims should have been raised in the federal action as pendent to the BHCA claim and accordingly that the BHCA judgment barred the state claims under res judicata, the District Court enjoined petitioners from further prosecuting the state action. The Court of Appeals affirmed, holding that the parties to the BHCA action were barred by res judicata from raising the state claims in state court after the entry of the federal judgment, and that the federal injunction was proper under the "relitigation exception" to the Anti-Injunction Act, which generally prohibits a federal court from enjoining state proceedings but excepts from the prohibition the issuance of an injunction by a federal court

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"where necessary . . . to protect or effectuate its judgments." The court did not consider the possible preclusive effect under Alabama law of the state court's resolution of the res judicata issue, holding instead that the "relitigation exception" to the Anti-Injunction Act worked a *pro tanto* amendment to the Full Faith and Credit Act, which requires federal courts as well as state courts to give state judicial proceedings "the same full faith and credit . . . as they have by law or usage in the courts of such State . . . from which they are taken."

Held: The Court of Appeals erred by refusing to consider the possible preclusive effect under Alabama law of the state-court judgment. Even if the state court mistakenly rejected respondents' res judicata claim, this would not justify the highly intrusive remedy of a federal-court injunction against enforcement of the state-court judgment. Rather, the Full Faith and Credit Act requires that the federal courts give the state-court judgment, and particularly the state court's resolution of the res judicata issue, the same preclusive effect it would have in another court of the same State. Pp. 4–8.

747 F. 2d 1367, reversed and remanded.

REHNQUIST, J., delivered the opinion for a unanimous Court.

SUPREME COURT OF THE UNITED STATES

No. 84–1616

PARSONS STEEL, INC., ET AL., PETITIONERS *v.* FIRST ALABAMA BANK AND EDWARD HERBERT

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

[January 27, 1986]

JUSTICE REHNQUIST delivered the opinion of the Court.

The Full Faith and Credit Act, 28 U. S. C. § 1738, requires federal courts as well as state courts to give state judicial proceedings "the same full faith and credit . . . as they have by law or usage in the courts of such State . . . from which they are taken." The Anti-Injunction Act, 28 U. S. C. § 2283, generally prohibits a federal court from granting an injunction to stay proceedings in a state court, but excepts from that prohibition the issuance of an injunction by a federal court "where necessary . . . to protect or effectuate its judgments." In the present case the Court of Appeals for the Eleventh Circuit held that the quoted exception to the latter Act worked a *pro tanto* amendment to the former, so that a federal court might issue an injunction against state-court proceedings even though the prevailing party in the federal suit had litigated in the state court and lost on the res judicata effect of the federal judgment. We granted certiorari to consider this question, 472 U. S. —— (1985), and now reverse the judgment of the Court of Appeals.

Petitioners Parsons Steel, Inc., and Jim and Melba Parsons sued respondents First Alabama Bank of Montgomery and Edward Herbert, a bank officer, in Alabama state court in February 1979, essentially alleging that the bank had fraudulently induced the Parsons to permit a third person to take control of a subsidiary of Parsons Steel and eventually to obtain complete ownership of the subsidiary. The subsidiary was adjudicated an involuntary bankrupt in April 1979, and the trustee in bankruptcy was added as a party plaintiff in the state action. In May 1979 Parsons Steel and the Parsons sued the bank in the United States District Court for the District of Alabama, alleging that the same conduct on the part of the bank that was the subject of the state-court suit also violated the Bank Holding Company Act (BHCA) amendments, 12 U. S. C. §§ 1971–1978. The trustee in bankruptcy chose not to participate in the federal action.

The parties conducted joint discovery in the federal and state actions. The federal action proceeded to trial on the issue of liability before the state action went to trial. A jury returned a verdict in favor of petitioners, but the District Court granted judgment n.o.v. to the bank. That judgment was affirmed on appeal. *Parsons Steel, Inc.* v. *First Alabama Bank of Montgomery*, 679 F. 2d 242 (CA11 1982). After the federal judgment was entered, respondents pleaded in the state action the defenses of res judicata and collateral estoppel based on that judgment. The Alabama court, however, ruled that res judicata did not bar the state action. Almost a year after the federal judgment was entered, the state complaint was amended to include a Uniform Commercial Code (UCC) claim that the bank's foreclosure sale of the subsidiary's assets was commercially unreasonable. A jury returned a general verdict in favor of petitioners, awarding a total of four million and one dollars in damages.

Having lost in state court, respondents returned to the District Court that had previously entered judgment in the bank's favor and filed the present injunctive action against petitioners, the plaintiffs in the state action.[1] The District Court found that the federal BHCA suit and the state action were based on the same factual allegations and claimed substantially the same damages. The court held that the state claims should have been raised in the federal action as pendent to the BHCA claim and accordingly that the BHCA judgment barred the state claims under res judicata. Determining that the Alabama judgment in effect nullified the earlier federal-court judgment in favor of the bank, the District Court enjoined petitioners from further prosecuting the state action.

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[1] Although the opinion of the Court of Appeals does not mention it, respondents apparently also filed in state court a timely post-trial motion for new trial or judgment n. o. v.

A divided panel of the Court of Appeals affirmed in relevant part, holding that the issuance of the injunction was not "an abuse of discretion" by the District Court. 747 F. 2d 1367 (1980). The majority first agreed with the District Court that the fraud and UCC claims presented issues of fact and law that could have been and should have been raised in the same action as the BHCA claim. Thus the parties to the BHCA action and their privies, including the trustee in bankruptcy, were barred by res judicata from raising these claims in state court after the entry of the federal judgment.

The majority then held that the injunction was proper under the so-called "relitigation exception" to the Anti-Injunction Act, 28 U. S. C. § 2283, which provides:

> "A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or *to protect or effectuate its judgments*" (emphasis added).

In reaching this holding, the majority explicitly declined to consider the possible preclusive effect, pursuant to the Full Faith and Credit Act, 28 U. S. C. § 1738,[2] of the state court's determination after full litigation by the parties that the earlier federal-court judgment did not bar the state action. According to the majority, "while a federal court is generally bound by other state court determinations, the relitigation exception empowers a federal court to be the final adjudicator as to the *res judicata* effects of its prior judgments on a subsequent state action." 747 F. 2d, at 1376 (footnote omitted).

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[2] The Full Faith and Credit Act provides, in pertinent part, that state judicial proceedings "shall have the same full faith and credit in every court within the United States . . . as they have by law or usage in the courts of such State . . . from which they are taken."

Finally, the majority ruled that respondents had not waived their right to an injunction by waiting until after the trial in the state action was completed. The majority concluded that the state-court pleadings were so vague that it was not clear until after trial that essentially the same cause of action was involved as the BHCA claim and that the earlier federal judgment was in danger of being nullified. According to the majority, the Anti-Injunction Act does not limit the power of a federal court to protect its judgment "to specific points in time in state court trials or appellate procedure." *Id.*, at 1377.[3]

The dissenting judge rejected "the majority's conclusion that the Anti-Injunction Act . . . implicitly amended the Full Faith and Credit Act, 28 U. S. C. § 1738." *Id.*, at 1381 (Hill, J., dissenting). He agreed with the majority that "section 2283 allows the district court to enter an injunction, perhaps grounded in the concept of res judicata, unless the state court has already addressed the res judicata issue on the merits," but would have held in cases where the state court has decided the res judicata issue that "section 1738 requires the federal court to afford full faith and credit to the state court's resolution of the issue." *Ibid.*

In our view, the majority of the Court of Appeals gave unwarrantedly short shrift to the important values of federalism and comity embodied in the Full Faith and Credit Act. As recently as last March, in *Marrese* v. *American Academy of Orthopaedic Surgeons*, 470 U. S. —— (1985), we reaffirmed our holding in *Migra* v. *Warren City School Dist. Bd. of Education*, 465 U. S. 75 (1984), that under the Full Faith and Credit Act a federal court must give the same preclusive effect to a state-court judgment as another court of that State would give. "It has long been established that § 1738 does not allow federal courts to employ their own rules of res judicata in determining the effect of state judgments. Rather, it goes beyond the common law and commands a federal court to accept the rules chosen by the State from which the judgment is taken." *Kremer* v. *Chemical Construction Corp.*, 456 U. S. 461, 481–482 (1982). The Full Faith and Credit Act thus "allow[s] the States to determine, subject to the requirements of the statute and the Due Process Clause, the preclusive effect of judgments in their own courts." *Marrese*, *supra*, at ——.

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[3] The Court of Appeals remanded the case to the District Court for a determination whether the trustee in bankruptcy should be allowed to litigate his UCC claim in state court because the trustee was not a party to the federal suit and the UCC claim might have been based on facts other than those that formed the basis for the federal action.

In the instant case, however, the Court of Appeals did not consider the possible preclusive effect under Alabama law of the state-court judgment, and particularly of the state court's resolution of the res judicata issue, concluding instead that the relitigation exception to the Anti-Injunction Act limits the Full Faith and Credit Act. We do not agree. "[A]n exception to § 1738 will not be recognized unless a later statute contains an express or implied partial repeal." *Kremer*, *supra*, at 468; *Allen* v. *McCurry*, 449 U. S. 90, 99 (1980). Here, as in *Kremer*, there is no claim of an express repeal; rather, the Court of Appeals found an implied repeal. "'It is, of course, a cardinal principle of statutory construction that repeals by implication are not favored,' *Radzanower* v. *Touche Ross & Co.*, 426 U. S. 148, 154 (1976); *United States* v. *United Continental Tuna Corp.*, 425 U. S. 164, 168 (1976), and whenever possible, statutes should be read consistently." 456 U. S., at 468. We believe that the Anti-Injunction Act and the Full Faith and Credit Act can be construed consistently, simply by limiting the relitigation exception of the Anti-Injunction Act to those situations in which the state court has not yet ruled on the merits of the res judicata issue. Once the state court has finally rejected a claim of res judicata, then the Full Faith and Credit Act becomes applicable and federal courts must turn to state law to determine the preclusive effect of the state court's decision.

The contrary holding of the Court of Appeals apparently was based on the fact that Congress in 1948 amended the Anti-Injunction Act to overrule this Court's decision in *Toucey* v. *New York Life Insurance Co.*, 314 U. S. 118 (1941), in favor of the understanding of prior law expressed in Justice Reed's dissenting opinion. See Revisor's Note to 1948 Revision of Anti-Injunction Act, 28 U. S. C., p. 377. But the instant case is a far cry from *Toucey*, and one may fully accept the logic of Justice Reed's dissent without concluding that it sanctions the result reached by the Court of Appeals here. In each of the several cases involved in *Toucey*, the prevailing party in the federal action sought an injunction against relitigation in state court as soon as the opposing party commenced the state action, and before there was any resolution of the res judicata issue by the state court. In the instant case, on the other hand, respondents chose to fight out the res judicata issue in state court first, and only after losing there did they return to federal court for another try.

The Court of Appeals also felt that the District Court's injunction would discourage inefficient simultaneous litigation in state and federal courts on the same issue—that is, the res judicata effect of the prior federal judgment. But this is one of the costs of our dual court system:

> "In short, the state and federal courts had concurrent jurisdiction in this case, and neither court was free to prevent either party from simultaneously pursuing claims in both courts." *Atlantic Coast Line R. Co.* v. *Locomotive Engineers*, 398 U. S. 281, 295 (1970).

Indeed, this case is similar to *Atlantic Coast Line*, in which we held that the various exceptions to the Anti-Injunction Act did not permit a federal court to enjoin state proceedings in circumstances more threatening to federal jurisdiction than the circumstances of this case. There we stated that the phrase "to protect or effectuate its judgments" authorized a federal injunction of state proceedings only "to prevent a state court from so interfering with a federal court's consideration or disposition of a case as to seriously impair the federal court's flexibility and authority to decide that case." *Ibid.*

We hold, therefore, that the Court of Appeals erred by refusing to consider the possible preclusive effect, under Alabama law, of the state-court judgment. Even if the state court mistakenly rejected respondents' claim of res judicata, this does not justify the highly intrusive remedy of a federal-court injunction against the enforcement of the state-court judgment. Rather, the Full Faith and Credit Act requires that federal courts give the state court judgment, and particularly the state court's resolution of the res judicata issue, the same preclusive effect it would have had in another court of the same State. Challenges to the correctness of a state court's determination as to the conclusive effect of a federal judgment must be pursued by way of appeal through the state-court system and certiorari from this Court. See *Angel* v. *Bullington*, 330 U. S. 183 (1947).

We think the District Court is best situated to determine and apply Alabama preclusion law in the first instance. See *Marrese* v. *American Academy of Orthopaedic Surgeons*, *supra*, at ——; *Migra* v. *Warren City School Dist. Bd. of Education*, *supra*, at ——. Should the District Court conclude that the state-court judgment is not entitled to preclusive effect under Alabama law and the Full Faith and Credit Act, it would then be in the best position to decide the propriety of a federal-court injunction under the general principles of equity, comity, and federalism discussed in *Mitchum* v. *Foster*, 407 U. S. 225, 243 (1972).

The judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.[4]

It is so ordered.

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[4] As an alternative basis for reversing the decision of the Court of Appeals, petitioners contend that the relitigation exception to the Anti-Injunction Act was never intended by Congress to allow the issuance of a federal-court injunction in situations where the later state action involves claims that could have been litigated, but were not actually litigated, in the prior federal action. Petitioners also ask us to review the Court of Appeals' holding that the trustee in bankruptcy, who was not a party to the first federal action, was nevertheless bound under res judicata by the judgment of the District Court in that action. Because of our resolution of the primary issue raised by petitioners, we do not address these additional arguments.

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(Slip Opinion)

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Lumber Co.*, 200 U. S. 321, 337.

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SUPREME COURT OF THE UNITED STATES

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Syllabus

GOLDEN STATE TRANSIT CORP. *v.* CITY OF LOS ANGELES

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 84-1644. Argued December 4, 1985—Decided April 1, 1986

While petitioner's application to renew its franchise to operate taxicabs in respondent city of Los Angeles was pending, petitioner's drivers went on strike. The City Council then conditioned renewal of the franchise on settlement of the labor dispute by a certain date. When the dispute was not settled by that date, the franchise expired. Petitioner filed suit in Federal District Court, alleging, *inter alia*, that the city's action was pre-empted by the National Labor Relations Act (NLRA). The District Court granted summary judgment for the city, and the Court of Appeals affirmed.

Held: The city's action in conditioning petitioner's franchise renewal on the settlement of the labor dispute is pre-empted by the NLRA. Pp. 5–11.

(a) The NLRA pre-emption principle precluding state and municipal regulation concerning conduct that Congress intended to be unregulated, *Machinists* v. *Wisconsin Employment Relations Comm'n*, 427 U. S. 132, is applicable here. Under this principle, States and municipalities are prohibited from imposing restrictions on economic weapons of self-help, unless such restrictions were contemplated by Congress. Pp. 5–7.

(b) Both the language of the NLRA and its legislative history demonstrate that the city's action contravened congressional intent. Pp. 7–11.

(c) The settlement condition imposed by the City Council destroyed the balance of power designed by Congress in the NLRA, and frustrated Congress' decision to leave open the use of economic weapons. P. 11.

754 F. 2d 830, reversed and remanded.

BLACKMUN, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN, WHITE, MARSHALL, POWELL, STEVENS, and O'CONNOR, JJ., joined. REHNQUIST, J., filed a dissenting opinion.

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D. C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

No. 84-1644

GOLDEN STATE TRANSIT CORPORATION, PETITIONER *v.* CITY OF LOS ANGELES

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

[April 1, 1986]

JUSTICE BLACKMUN delivered the opinion of the Court.

The city of Los Angeles, Cal., refused to renew Golden State Transit Corporation's taxicab franchise after the company's drivers went on strike. We are asked to decide whether, under *Machinists* v. *Wisconsin Employment Relations Comm'n*, 427 U. S. 132 (1976), the city's action is preempted by the National Labor Relations Act (NLRA), 29 U. S. C. § 151 *et seq.*

I

In 1980, Golden State, which operated taxicabs under the Yellow Cab name, applied to the city for a renewal of its operating franchise eventually scheduled to lapse on March 31, 1981. That franchise had first been acquired in 1977. On September 4, 1980, the city's Board of Transportation Commissioners recommended the renewal of Golden State's franchise—the largest, with approximately 400 cabs, of companies operating in Los Angeles—along with the franchises of 12 other taxi companies.

In October, while the franchise renewal application was pending, Golden State's labor contract with its drivers expired. The company and the drivers, represented by Local 572 of the International Brotherhood of Teamsters, signed a short-term contract in order that operations would continue while negotiation and mediation proceeded. This interim contract was to expire at midnight February 10, 1981, the day before the city council was scheduled to consider action on the franchise renewals.

On February 2, the council's Transportation and Traffic Committee endorsed franchise renewals recommended by the Board of Transportation Commissioners. The committee's report stated that Golden State and other companies were "in compliance with all terms and conditions of their franchise[s]." App. 39.

On February 11, the drivers struck Golden State, halting its operations. At the council meeting that day, Teamster representatives argued against renewal of Golden State's franchise because of the pendency of the labor dispute. The council postponed decision on Golden State's application until February 17, but, with possibly one exception, approved all other franchise renewal applications. At the February 17 meeting, when the union again opposed the renewal, the council voted to extend Golden State's franchise from March 31 to April 30, but only if the council expressly found, on or before March 27, that the extension was in the best interests of the city.

At its March 23 meeting, the council held a short public hearing on whether it should grant the limited extension. By this time, the labor dispute and the franchise renewal issue had become clearly intertwined. The Teamsters opposed any extension of the Yellow Cab franchise, stating that such action would simply lengthen the strike and keep the drivers out of work. It preferred to see the franchise terminated, and to have the drivers seek jobs from Golden State's successor or from other franchise holders. As others spoke, the discussion turned to whether there was even a need for Yellow Cab, in light of the services performed by the other 12 franchised taxi companies. There were comments regarding an excess of cabs; the city's policy at the time, however, was not to limit the number of taxi companies or the number of taxis in each fleet. *Id.*, at 81–82.

The strike was central to the discussion. One council member charged Golden State with negotiating unreasonably, *id.*, at 71, while another accused the company of trying to "brea[k] the back of the union." *Id.*, at 66. The sympathies of the council members who spoke lay with the union. But rather than defeat the renewal outright, the council reached a consensus for rejection of the extension with a possibility for reopening the issue if the parties settled their labor dispute before the franchise expired the following week. Four council members endorsed this approach, and the assistant city attorney said that he clearly had informed the parties that this was the city's position. *Id.*, at 68. The council president said: "I find that it will be very difficult to get this ordinance past [sic] to extend this franchise if the labor dispute is not settled by the end of this week." *Id.*, at 75. He added: "I just think that this kind of information should be put out in the open, so everybody understands it." *Ibid.* The council, by a vote of 11–to–1, defeated the motion to extend the franchise and it expired by its terms on March 31.

II

Golden State filed this action in the United States District Court for the Central District of California, alleging that the city's action was pre-empted by the NLRA and violated the company's rights to due process and equal protection. It sought declaratory and injunctive relief and damages. The District Court found that it was "undisputed that the sole basis for refusing to extend [Golden State's] franchise was its labor dispute with its Teamster drivers," 520 F. Supp. 191, 193 (1981); that the council had "threaten[ed] to allow Yellow Cab's franchise to terminate unless it entered into a collective bargaining agreement with the Teamsters," *id.*, at 194; and that the council had denied the company an essential weapon of economic strength—the ability to wait out a strike. On the basis of the pre-emption claim, the District Court granted Golden State's motion for a preliminary injunction to preserve the franchise. *Ibid.* The Court of Appeals for the Ninth Circuit found "ample evidence" in the record to support the District Court's finding, but nevertheless vacated the injunction. 686 F. 2d 758, 759, 762 (1982). The court reasoned that Golden State had little chance of prevailing on its pre-emption claim or on the other grounds it asserted. This Court denied Golden State's petition for certiorari. 459 U. S. 1105 (1983).

Following litigation on unrelated issues,[1] and with the company having abandoned its equal protection claim, the District Court granted summary judgment for the city. App. to Pet. for Cert. 11a. Golden State had not moved for summary judgment in its favor. The Court of Appeals affirmed, holding that the city's action was not pre-empted. 754 F. 2d 830 (CA9 1985). The court felt that, when the activity regulated is only a peripheral or incidental concern of labor policy, traditional municipal regulation is not pre-empted. The court found nothing in the record to suggest that the city's nonrenewal decision "was not concerned with transportation." *Id.*, at 833. Moreover, to avoid undue restriction of local regulation, "only actions seeking to directly alter the substantive outcome of a labor dispute should be preempted." Here, the city had not attempted to dictate the terms of the agreement, but had "merely insisted upon resolution of the dispute as a condition to franchise renewal." *Ibid.* The Court of Appeals also rejected Golden State's due process claim. *Id.*, at 833–834.[2] Because of our concern about the propriety of the grant of summary judgment for the city in this factual and labor context, we granted certiorari. 472 U. S. —— (1985).[3]

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[1] Antitrust claims were asserted in a second amended complaint filed by Golden State. The District Court granted the city partial summary judgment as to these claims, 563 F. Supp. 169 (CD Cal. 1983), and the Court of Appeals affirmed. 726 F. 2d 1430 (CA9 1984). We again denied certiorari. 471 U. S. —— (1985).

[2] One judge concurred in the majority's due process analysis but otherwise concurred only in the judgment. As to pre-emption, he would have granted summary judgment for the city on the ground that Golden State had failed to provide evidence of the city's motive or of the economic impact on Golden State. 754 F. 2d, at 834.

III

A

Last Term, in *Metropolitan Life Ins. Co.* v. *Massachusetts*, 471 U. S. —— (1985), we again noted: "The Court has articulated two distinct NLRA pre-emption principles." *Id.*, at —— (slip op. 23). See, also, *Belknap, Inc.* v. *Hale*, 463 U. S. 491, 498–499 (1983). The first, the so-called *Garmon* pre-emption, see *San Diego Building Trades Council* v. *Garmon*, 359 U. S. 236 (1959), prohibits States from regulating "activity that the NLRA protects, prohibits, or arguably protects or prohibits." *Wisconsin Dept. of Industry* v. *Gould Inc.*, 475 U. S. ——, —— (1986) (slip op. 4). The *Garmon* rule is intended to preclude state interference with the Labor Board's interpretation and active enforcement of the "integrated scheme of regulation" established by the NLRA. *Id.*, at —— (slip op. 6). See *Metropolitan Life Ins. Co.* v. *Massachusetts*, 471 U. S., at —— and n. 26 (1985) (slip op. 23 and n. 26).

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[3] The city contends that the case is moot because the franchise, if renewed, would have expired on March 31, 1985. But if petitioner's franchise renewal had been granted in 1981, petitioner would have faced a renewal procedure in 1985 rather than the more onerous task of obtaining a franchise through competitive bidding. See Tr. of Oral Arg. 25–26. But for the nonrenewal in 1981, Golden State would be more likely to have an operating franchise now. At oral argument, counsel for Golden State said the company was ready to resume operations, even though it was in Chapter 11 bankruptcy. Tr. of Oral Arg. 5. It therefore cannot be said that "[i]ntervening events have . . . 'irrevocably eradicated the effects of the alleged violation.'" *Los Angeles* v. *Lyons*, 461 U. S. 95, 101 (1983), quoting *County of Los Angeles* v. *Davis*, 440 U. S. 625, 631 (1979). We conclude, therefore, that the case is not moot.

This case, however, concerns the second pre-emption principle, the so-called *Machinists* pre-emption.[4] See *Machinists* v. *Wisconsin Employment Relations Comm'n*, 427 U. S. 132 (1976). This precludes state and municipal regulation "concerning conduct that Congress intended to be unregulated." *Metropolitan Life Ins. Co.* v. *Massachusetts*, 471 U. S., at —— (slip op. 23).[5] Although the labor-management relationship is structured by the NLRA, certain areas intentionally have been left "'to be controlled by the free play of economic forces.'" *Machinists*, 427 U. S., at 140, quoting *NLRB* v. *Nash-Finch Co.*, 404 U. S. 138, 144 (1971). The Court recognized in *Machinists* that "'Congress has been rather specific when it has come to outlaw particular economic weapons,'" 427 U. S., at 143, quoting *NLRB* v. *Insurance Agents*, 361 U. S. 477, 498 (1960), and that Congress' decision to prohibit certain forms of economic pressure while leaving others unregulated represents an intentional balance "'between the uncontrolled power of management and labor to further their respective interests.'" *Machinists*, 427 U. S., at 146, quoting *Teamsters* v. *Morton*, 377 U. S. 252, 258–259 (1964). States are therefore prohibited from imposing additional restrictions on economic weapons of self-help, such as strikes or lockouts, see 427 U. S., at 147, unless such restrictions presumably were contemplated by Congress.

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[4] We do not reach the question whether the city's action in this case is pre-empted under *Garmon*, because Golden State and its supporting *amici*, including the NLRB, rely exclusively on the *Machinists* doctrine, and we find their argument persuasive.

[5] Our pre-emption analysis is not affected by the fact that we are reviewing a city's actions rather than those of a State. See *Fisher* v. *Berkeley*, 475 U. S. ——, —— (1986) (No. 84–1538, slip op. 4). And the fact that the city acted through franchise procedures rather than a court order or a general law also is irrelevant to our analysis. "[J]udicial concern has necessarily focused on the nature of the activities which the States have sought to regulate, rather than on the method of regulation adopted." *San Diego Building Trades Council* v. *Garmon*, 359 U. S. 236, 243 (1959). See *Wisconsin Dept. of Industry* v. *Gould Inc.*, 475 U. S. —— (1986).

"Whether self-help economic activities are employed by employer or union, the crucial inquiry regarding pre-emption is the same: whether 'the exercise of plenary state authority to curtail or entirely prohibit self-help would frustrate effective implementation of the Act's processes.'" *Id.*, at 147–148, quoting *Railroad Trainmen* v. *Jacksonville Terminal Co.*, 394 U. S. 369, 380 (1969).

B

There is no question that the Teamsters and Golden State employed permissible economic tactics. The drivers were entitled to strike—and to time the strike to coincide with the council's decision—in an attempt to apply pressure on Golden State. See *NLRB* v. *Insurance Agents*, 361 U. S., at 491, 496. And Golden State was entirely justified in using its economic power to withstand the strike in an attempt to obtain bargaining concessions from the union. See *Belknap, Inc.* v. *Hale*, 463 U. S., at 493, 500 (employer has power to hire replacements during an economic strike); *American Ship Building Co.* v. *NLRB*, 380 U. S. 300, 318 (1965) (at bargaining impasse employer may use lockout solely to bring economic pressure on union).

The parties' resort to economic pressure was a legitimate part of their collective-bargaining process. *Machinists*, 427 U. S., at 144. But the bargaining process was thwarted when the city in effect imposed a positive durational limit on the exercise of economic self-help. The District Court found that the council had conditioned the franchise on a settlement of the labor dispute by March 31. We agree with the Court of Appeals that this finding is amply supported by the record.[6] The city's insistence on a settlement is pre-empted if the city "'[entered] into the substantive aspects of the bargaining process to an extent Congress has not countenanced.'" *Machinists*, 427 U. S., at 149, quoting *NLRB* v. *Insurance Agents*, 361 U. S., at 498.

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[6] The District Court's finding is supported by objective factors such as what the city—through the council and the city attorney—told the parties, and its schedule of council meetings. At the meeting of March 23, 1981, four council members without contradiction pointedly conveyed the settlement condition to the parties as the council's "bottom line" on the issue. The condition also was announced to the parties by the council's agent, the

That such a condition—by a city or the Labor Board—contravenes congressional intent is demonstrated by the language of the NLRA and its legislative history. The NLRA requires an employer and a union to bargain in good faith, but it does not require them to reach agreement. Section 8(d), as amended, 29 U. S. C. § 158(d) (duty to bargain in good faith "does not compel either party to agree to a proposal or require the making of a concession"); *NLRB* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1, 45 (1937) ("The theory of the Act is that free opportunity for negotiation . . . may bring about the adjustments and agreements which the Act in itself does not attempt to compel").

The Act leaves the bargaining process largely to the parties. See *H.K. Porter Co.* v. *NLRB*, 397 U. S. 99, 103 (1970). It does not purport to set any time limits on negotiations or economic struggle. Instead, the Act provides a framework for the negotiations; it "is concerned primarily with establishing an equitable process for determining terms and conditions of employment." *Metropolitan Life Ins. Co.* v. *Massachusetts*, 471 U. S., at —— (slip op. 28). See also § 1, as amended, of the NLRA, 29 U. S. C. § 151 (Act achieves national policy "by encouraging the practice and procedure of collective bargaining").

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assistant city attorney, revealing that the condition was city policy. Moreover, the condition was evident from the schedule on which the council considered the question. Golden State's franchise issue was deferred from February 11 to the 17th, from February 17 to March 23, and from March 23 to the 31st. Only Golden State, among the franchise applicants, was subjected to a conditional one-month extension of its franchise. The only plausible reason for these repeated short extensions is that the city was giving the franchise holder additional time to comply with a particular requirement. Yet Golden State was in compliance with all the terms of the franchise except the council's desire for a settlement.

The legislative history, too, makes clear that the Act and the Labor Board were intended to facilitate bargaining between the parties. The Senate Report states: "Disputes about wages, hours of work, and other working conditions should continue to be resolved by the play of competitive forces . . . . This bill in no respect regulates or even provides for supervision of wages or hours, nor does it establish any form of compulsory arbitration." S. Rep. No. 573, 74th Cong., 1st Sess., 2 (1935). Senator Wagner, sponsor of the NLRA, said that the Board would not usurp the role of free collective action. See 79 Cong. Rec. 6184 (1935). See also *id.*, at 7574 (Sen. Wagner affirming that the Act encourages "voluntary settlement of industrial disputes").

Protecting the free use of economic weapons during the course of negotiations was the rationale for this Court's findings of pre-emption in *Machinists* and in its predecessor, *Teamsters* v. *Morton*, *supra*. In some areas of labor relations that the NLRA left unregulated, we have concluded that Congress contemplated state regulation. See *Metropolitan Life Ins. Co.* v. *Massachusetts*, 471 U. S., at —— (slip op. 28–32); *New York Tel. Co.* v. *New York Labor Dept.*, 440 U. S. 519, 540–544 (1979) (plurality opinion); *id.*, at 547 and 549 (concurring opinions). Los Angeles, however, has pointed to no evidence of such congressional intent with respect to the conduct at issue in this case.[7]

Instead, the city argues that it is somehow immune from labor pre-emption solely because of the nature of its conduct.[8] The city contends it was not regulating labor, but simply exercising a traditional municipal function in issuing taxicab franchises. We recently rejected a similar argument to the effect that a State's spending decisions are not subject to pre-emption. See *Wisconsin Dept. of Industry* v. *Gould Inc.*, 475 U. S., at —— (slip op. 5). Cf. *Metropolitan Life Ins. Co.* v. *Massachusetts*, 471 U. S., at —— (slip op. 28–32). Similarly, in the transportation area, a State may not ensure uninterrupted service to the public by prohibiting a strike by the unionized employees of a privately owned local transit company. See *Bus Employees* v. *Missouri*, 374 U. S. 74 (1963); cf. *Bus Employees* v. *Wisconsin Board*, 340 U. S. 383, 391–392 (1951). Nor in this case may a city restrict a transportation employer's ability to resist a strike. Although in each *Bus Employees* case the employees' right to strike was protected by § 7, as amended, of the NLRA, 29 U. S. C. § 157, "'[r]esort to economic weapons should more peaceful measures not avail' is the right of the employer as well as the employee," and "the State may not prohibit the use of such weapons . . . any more than in the case of employees." *Machinists* v. *Wisconsin Employment Relations Comm'n*, 427 U. S., at 147, quoting *American Ship Building Co.* v. *NLRB*, 380 U. S., at 317. "[F]ederal law intended to leave the employer and the union free to use their economic weapons against one another." *Belknap, Inc.* v. *Hale*, 463 U. S., at 500. We hold, therefore, that the city was pre-empted from conditioning Golden State's franchise renewal on the settlement of the labor dispute.

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[7] There is no issue here that, rather than regulating the relationship between the employer and the union, the city's action protected innocent third parties from the employer. See *Belknap, Inc.* v. *Hale*, 463 U. S. 491, 500 (1983) (third parties hired as strike replacements based on misrepresentations by the employer had state-law causes of action).

[8] The Court of Appeals, in holding that the city's action was not pre-empted, reasoned that what the city did involved merely a peripheral concern of federal labor law. The idea that state action may be upheld under such circumstances is part of the *Garmon* analysis. See *Belknap, Inc.* v.

The city, however, contends that it was in a no-win situation: having not renewed the franchise and thus permitting it to lapse, it stands accused of favoring the union; had it granted the renewal, it would have been accused of favoring

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Hale, 463 U. S., at 498–499. Because we hold that the city directly interfered with the bargaining process—a central concern of the NLRA—we need not reach the question whether this exception applies to a *Machinists* case. But see *Metropolitan Life Ins. Co.* v. *Massachusetts*, 471 U. S. ——, —— (1985) (No. 84–325, slip op. 28–32).

the employer. But the question is not whether the city's action favors one side or the other. Our holding does not require a city to renew or to refuse to renew any particular franchise. We hold only that a city cannot condition a franchise renewal in a way that intrudes into the collective-bargaining process.

C

"Free collective bargaining is the cornerstone of the structure of labor-management relations carefully designed by Congress when it enacted the NLRA." *New York Tel. Co.* v. *New York Labor Dept.*, 440 U. S., at 551 (POWELL, J., dissenting). Even though agreement is sometimes impossible, government may not step in and become a party to the negotiations. See *H.K. Porter Co.* v. *NLRB*, 397 U. S., at 103–104. A local government, as well as the Labor Board, lacks the authority to "'introduce some standard of properly "balanced" bargaining power' . . . or to define 'what economic sanctions might be permitted negotiating parties in an "ideal" or "balanced" state of collective bargaining.'" *Machinists* v. *Wisconsin Employment Relations Comm'n*, 427 U. S., at 149–150, quoting *NLRB* v. *Insurance Agents*, 361 U. S. 477, 497–500 (1960). The settlement condition imposed by the Los Angeles city council, as we read the summary-judgment record before us, destroyed the balance of power designed by Congress, and frustrated Congress' decision to leave open the use of economic weapons.

In this case, the District Court and the Court of Appeals found that the city had conditioned the renewal of Golden State's franchise on the company's reaching a labor agreement with the Teamsters, but held that the city's action was not pre-empted by *Machinists*. This was error as a matter of law. Whether summary judgment should have been entered for Golden State is a matter we do not decide, for petitioner made no motion for summary judgment on the issue of pre-emption.

The summary judgment entered for the city is reversed and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

SUPREME COURT OF THE UNITED STATES

No. 84–1644

GOLDEN STATE TRANSIT CORPORATION, PETITIONER *v.* CITY OF LOS ANGELES

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

[April 1, 1986]

JUSTICE REHNQUIST, dissenting.

The city of Los Angeles refused to renew Golden State's taxicab franchise unless it settled a labor dispute with its drivers. The Court of Appeals for the Ninth Circuit stated that "[n]othing in the record indicates that the City's refusal to renew or extend Golden State's franchise until an agreement was reached and operations resumed was not concerned with transportation." 754 F. 2d 830, 833 (1985). Nonetheless, the Court today holds that "a city cannot condition a franchise renewal in a way that intrudes into the collective-bargaining process." *Ante*, at 11. The extraordinary breadth of the Court's holding is best illustrated by comparing it to this Court's initial cases involving federal labor preemption.

In *Bethelehem Steel Co.* v. *New York State Labor Relations Board*, 330 U. S. 767 (1947), this Court addressed the permissible scope of state regulation of labor disputes by examining New York's so-called Little Wagner Act, under which foremen were permitted to unionize. The status of foremen under the federal Act had been a matter of dispute at the time that New York asserted its right to supervise the organization of a union of foremen at the Bethlehem Steel Company plant in that State. See *id.*, at 770. The State argued that its labor relations machinery could operate at least until similar benefits for foremen were sought by the union under the federal Act. See *id.*, at 771. This Court held that the federal law pre-empted the state law on this point; both dealt with exactly the same subject matter and whether or not they were the same or different with respect to the permissibility of organizing foremen made no difference. *Id.*, at 775. If they were the same, the procedures were duplicative. *Id.*, at 776. If they were different, they were potentially antagonistic. *Ibid.*

Six years later, in *Garner* v. *Teamsters*, 346 U. S. 485 (1953), the Court was presented with a claim of pre-emption under the Taft-Hartley Act, which imposed regulations and duties on labor correlative to the those imposed on management by the Wagner Act. The case involved unionized drivers who had engaged in conduct clearly prohibited by the Taft-Hartley Act, which might have made them subject to a cease-and-desist order by the National Labor Relations Board. See *id.*, at 486–487. But instead of resorting to the federal agency, the employer successfully sought an injunction against the prohibited picketing from a Pennsylvania state court. See *id.*, at 487. This Court held that state duplication of remedies provided by the National Labor Relations Act was pre-empted even though the state remedy was provided by a court rather than a state labor agency. See *id.*, at 487, 499–501.

The opinions in both *Bethlehem Steel* and *Garner* observed that Congress had furnished no guidance to the Court as to whether or not state regulation should be pre-empted:

> "Congress has not seen fit to lay down even the most general of guides to construction of the Act, as it sometimes does, by saying that its regulation either shall or shall not exclude state action." *Bethlehem Steel*, *supra*, at 771.
>
> "The national Labor Management Relations Act, as we have before pointed out, leaves much to the states, though Congress has refrained from telling us how much." *Garner*, *supra*, at 488 (footnote omitted).

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The Court stated in both that it was forced simply to devine the will of Congress by implication:

> "[The] exclusion of state action may be implied from the nature of the legislation and the subject matter although express declaration of such result is wanting." *Bethlehem Steel*, *supra*, at 772.
>
> "We must spell out from conflicting indications of congressional will the area in which state action is still permissible." *Garner*, *supra*, at 488.

From the acorns of these two very sensible decisions has grown the mighty oak of this Court's labor pre-emption doctrine, which sweeps ever outward though still totally uninformed by any express directive from Congress. The National Labor Relations Board, organized management, and organized labor have vied with each other in urging the Court to sweep into the maw of labor relations law concerns that would have been regarded as totally peripheral to that body of law by the Congresses which enacted the Wagner Act and the Taft-Hartley Act.

Today we are told that a city, not seeking to place its weight on one side or the other of the scales of economic warfare, may not condition the renewal of a taxicab franchise on the settlement of a labor dispute. The settlement of that dispute would have enabled the company to put its taxis back on the streets where the franchise presumably contemplated they would be. The Court says that since the Labor Board may not structure an ideal balance of collective-bargaining weapons, the city may not consider the existence of a labor dispute in deciding whether to renew a franchise. See *ante*, at 11. We are further told that because a State may not legislate to provide uninterrupted service to the public by prohibiting a strike of public utility employees, a city may not act upon its views of sound transportation policy to refuse to renew a taxi franchise unless the franchisee settles a labor dispute and returns its cabs to the purpose for which the franchise exists. See *ante*, at 9–10. Such sweeping generalizations commend themselves neither to common sense nor to whatever hypothetical "intent of Congress" as can be discerned in an area so remote from the core concerns of labor-management relations addressed by federal labor law.

Federal pre-emption of state law is a matter of congressional intent, presumed or expressed. Because Congress cannot foresee the various ways in which state laws might rub up against the operation of federal statutes, the Court in a multitude of cases has held state regulation pre-empted even when Congress has not expressed any intent to pre-empt because of the danger that the existence of federal and state regulations side by side will interfere with the achievement of the objectives of the federal legislation. The entire body of this Court's labor law pre-emption doctrine has been built on a series of implications as to congressional intent in the face of congressional silence, so that we now have an elaborate pre-emption doctrine traceable not to any expression of Congress, but only to statements by this Court in its previous opinions of what Congress must have intended.

The Court today doffs its hat to the legislative history of the Wagner Act and comes up with the following three items:

> "[1] The Senate Report states: 'Disputes about wages, hours of work, and other working conditions should continue to be resolved by the play of competitive forces. . . . This bill in no respect regulates or even provides for supervision of wages or hours, nor does it establish any form of compulsory arbitration. . . .'
>
> [2] Senator Wagner, sponsor of the NLRA, said that the Board would not usurp the role of free collective action. . . .
>
> [3] Senator Wagner affirm[ed] that the Act encourages 'voluntary settlement of industrial disputes.'" *Ante*, at 9 (citations omitted).

These three bits of legislative history furnish absolutely no support for the result the Court reaches today. The

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observations that the Wagner Act leaves it to the parties to resolve their disputes by the play of competitive forces, that the Labor Board would not usurp the role of free collective action, and that the Act encourages voluntary settlement of industrial disputes, simply do not speak to the question whether a city may condition the renewal of a taxicab franchise on the settlement of a labor dispute. I do not believe that Congress intended the labor law net to be cast this far, and I therefore dissent.

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(Slip Opinion)

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Lumber Co.*, 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

LEE *v.* ILLINOIS

CONTIN

CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, FIFTH DISTRICT

No. 84-6807. Argued December 9, 1985—Decided June 3, 1986

Petitioner and a codefendant, charged with committing a double murder, were tried jointly in an Illinois court in a bench trial at which neither defendant testified. In finding petitioner guilty of both murders, the judge expressly relied on portions of the codefendant's confession, particularly with respect to the judge's rejection of petitioner's assertions that she had not participated in the murder of one of the victims and that she had acted either in self-defense or under intense and sudden passion in killing the other victim. The Illinois Appellate Court affirmed petitioner's convictions, rejecting her contention that her rights under the Confrontation Clause were violated by the trial judge's consideration of the codefendant's confession against her.

Held: The trial court's reliance upon the codefendant's confession as substantive evidence against petitioner violated her rights under the Confrontation Clause of the Sixth Amendment. Pp. 8–17.

(a) The right of cross-examination is included in an accused's right to confront the witnesses against him; the right to confront and to cross-examine witnesses is primarily a functional right that promotes reliability in criminal trials. This truthfinding function of the Confrontation Clause is uniquely threatened when an accomplice's confession is sought to be introduced against a defendant without the benefit of cross-examination, since such a confession is hearsay, subject to all the dangers of inaccuracy which characterize hearsay generally, and since the accomplice may have a strong motivation to implicate the defendant and to exonerate himself. Thus, accomplices' confessions that incriminate defendants are presumptively unreliable. Pp. 9–12.

(b) On the record here, the codefendant's confession did not bear sufficient independent "indicia of reliability," *Ohio* v. *Roberts*, 448 U. S. 56, 66, to rebut the presumption of unreliability. The circumstances

I

Syllabus

surrounding the confession did not rebut the presumption that the codefendant's statement could not be trusted as regards petitioner's participation in the murders. Nor is there any merit to Illinois' assertion that reliability was established because petitioner's confession and the codefendant's confession "interlocked" on some points. A codefendant's confession is not rendered reliable simply because some of the facts it contains "interlock" with the facts of the defendant's statement. Although the confessions here overlapped in their factual recitations to a great extent, they clearly diverged with respect to petitioner's participation in the planning of one victim's death, her facilitation of the murder of the other victim, and factual circumstances relevant to the couple's premeditation. Thus, the subjects upon which the two confessions did not "interlock" cannot be characterized as irrelevant or trivial. The determination, in the first instance, of whether the error as to the trial judge's consideration of the codefendant's confession was harmless, is for the state courts. Pp. 12–17.

—— Ill. App. 3d ——, —— N. E. 2d ——, reversed and remanded.

BRENNAN, J., delivered the opinion of the Court, in which WHITE, MARSHALL, STEVENS, and O'CONNOR, JJ., joined. BLACKMUN, J., filed a dissenting opinion, in which BURGER, C.J., and POWELL and REHNQUIST, JJ., joined.

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D. C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

No. 84-6807

MILLIE R. LEE, PETITIONER *v.* ILLINOIS

ON WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, FIFTH DISTRICT

[June 3, 1986]

JUSTICE BRENNAN delivered the opinion of the Court.

Petitioner and a codefendant, charged with committing a double murder, were tried jointly in a bench trial. Neither defendant testified at trial. In finding petitioner guilty as charged, the trial judge expressly relied on portions of the codefendant's confession, obtained by police at the time of arrest, as substantive evidence against petitioner. The question for decision is whether such reliance by the judge upon the codefendant's confession violated petitioner's rights as secured by the Confrontation Clause of the Sixth Amendment[1], as applied to the States through the Fourteenth Amendment.

I

In February 1982, police officers of East St. Louis asked petitioner Millie Lee to come to the police station to help identify a badly burned body that the police had discovered in an apartment in the housing complex in which Lee lived. While Lee was examining photographs of the body, a detective noticed that she began to cry. The detective advised Lee of her *Miranda* rights, and began to question her about the whereabouts of her aunt, Mattie Darden[2], with whom

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[1] The Confrontation Clause provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him. . . ."

[2] Mattie Darden was known also as "Aunt Beety" or "Aunt Beedie."

Lee shared an apartment. After giving a number of confused and conflicting accounts concerning when she had last seen or talked to her aunt, Lee finally admitted that she and her boyfriend, Edwin Thomas, had been involved in the stabbing of both Aunt Beedie and her friend, Odessa Harris, and that the body was her Aunt Beedie's. At that point, the officers questioning Lee again read her her *Miranda* rights, placed her under arrest, and continued to question her. After concluding their interview with Lee, the police presented her with a typewritten account of her statement, which included at the top of the first page a recitation and waiver of her *Miranda* rights. Lee read and signed each page of the confession.

Petitioner's codefendant, Edwin Thomas, arrived at the police station, ostensibly for "questioning" about the homicides, while police officers were still in the process of interviewing Lee; nonetheless, the police apparently were sufficiently informed of Thomas' involvement such that upon his arrival, he was read his rights and confronted by an officer with his alleged participation in the murders. Thomas indicated at that point that he "wanted to think about" whether to talk to the police.

During her questioning by the police, Millie Lee had asked to see Edwin Thomas; after being advised of his rights, Thomas asked if he could see Lee. After they obtained Lee's confession, the police allowed the two to meet. Lee and Thomas were permitted to kiss and to hug, and one of the officers then asked Lee, in the presence of Thomas, ". . . what was the statement you had just given us implicating Edwin . . ." Lee said to Thomas: "They know about the whole thing, don't you love me Edwin, didn't you in fact say . . . that we wouldn't let one or the other take the rap alone. . . ." At that point, Thomas gave a statement to the police, which was later typed and then presented to Thomas for his review and signature.

According to Lee's statement, on the evening of February 11, 1982, she and Thomas were at home in the apartment that Lee shared with Aunt Beedie when the aunt and her friend Odessa Harris arrived at approximately 8:30 or 9 p.m. Aunt Beedie and Odessa went into the bedroom, while Lee did the dishes in the kitchen. Thomas, who had been watching television, joined Lee in the kitchen, and the two apparently had "two or three words not really an argument." Odessa then came out of the bedroom to the kitchen and asked "what the hell was going on." As related in Lee's confession, Odessa "said we ought to be ashamed of ourselves arguing and making all that noise. I told her it was none of her business that she didn't live here . . ." Odessa returned to the bedroom.

As Lee's account further related, after Odessa returned to the bedroom Lee called her back into the kitchen in order to confirm whether Aunt Beedie had "really" paid the rent. Odessa assured Lee that the rent had indeed been paid, and then complained once more about the fact that Lee and Thomas had been arguing. As Odessa left the kitchen to return to the bedroom, she passed Thomas and gave him "dirty looks." When Odessa turned her head Thomas got up from his chair and stabbed Odessa in the back with a 24-inch-long knife. Odessa fell on the floor, and called out to Aunt Beedie. Lee explained that she then

> "ran, well I don't know if I ran or walked into the bedroom. Edwin was standing over by the kitchen cabinet with the knife in his hand with blood on it. Odessa was laying there moaning. When I went into the bedroom my aunt Beety was sitting on the bed and then she got up and had a knife in her hand. I don't know where the knife came from, my aunt usually kept her gun by her bed. I don't know what kind of gun it is. When my aunt got up off the bed she told me to get out of her way or she would kill me and then she swung at me with the knife. I ran into the kitchen and got a butcher knife that was sitting on the kitchen table and then I went

> back into the bedroom where my aunt was and then I stabbed her. I kept stabbing her. The first time I stabbed her, I hit her in the chest, I kept stabbing her and I really don't know where else I stabbed her, I had my eyes closed some of the time."

Lee's statement also included an account of some of the circumstances leading up to the killing:

> "Me, and Edwin had talked about stop[p]ing aunt Mattie from harassing me before. She would come in drunk or would get on the phone and tell people that I never did anything for her that I wouldn't give her anything to eat, or anything since I had a boyfriend. . . . Edwin used to get mad when my aunt would talk about me and that he couldn't take much more of what my auntie was doing, that when he began talking about doing something to aunt Beetty but he never said what. Odessa was always jumping up in my face and one time about a month ago me and Odessa got into an argument about my dress that I let Odessa use and Edwin seen her get in my face that time. He, Edwin just couldn't stand to see my auntie or Odessa harass me anymore. Things just kept adding up and adding up and the night that we killed Odessa and my aunt Beetty Edwin just couldn't take anymore."

Thomas' confession paralleled Lee's in several respects. It described the argument between himself and Lee, the confrontation with Odessa in the kitchen, and the stabbings of Odessa and then Aunt Beedie. However, Thomas's statement provided an altogether different version of how he and Lee came to commit the murders. Most significantly, Thomas stated that he and Lee had previously discussed killing Aunt Beedie, and referred to conversations immediately prior to the murders that suggested a premeditated plan to kill. According to Thomas, after Odessa scolded Lee for arguing with Thomas:

> "This is when I asked [Lee] 'did she still want to go through with it?' I was referring to what we had plained [sic] before about killing Aunt Beedie. We had talked about doing something to Aunt Beedie, but we had not figure out just what we would do. We had never before discussed doing anything to Odessa just Aunt Beedie, because we were tired of Aunt Beedie getting drunk, and coming home and "going off" on [Lee]. . . . After asking [Lee], 'did she still want to do it?' [Lee] first gave me a funny look, as though she was not going to do it, she stared into space for awhile, then she looked at me and said, 'yes.'
>
> "We decided that if we did som[e]thing to Aunt Beedie, we had to do something with Odessa. We wanted Odessa to leave, but she stayed there. We had plained [sic] that [Lee] was supposed to get Odessa to stand, with her back toward the front room, looking into the kitchen, while I would grab her from the back, using the big knife. . . ."

Lee's statement, by contrast, suggested that it was Thomas who had been provoked by Aunt Beedie's behavior and Thomas who had snapped the night of the murders. Her statement made no mention of an alleged decision by herself and Thomas to "go through with it," nor, of course, did it indicate that the two had formulated a plan to induce Odessa to return to the kitchen where Thomas would kill her. On the contrary, Lee asserted that on the night of the killings "Edwin just couldn't take anymore."

Lee and Thomas were charged in a two-count indictment with murder. Count one charged them with the murder of Aunt Beedie, and count two with the murder of Odessa. They were appointed separate counsel for trial.

On the day of trial, counsel for the two defendants withdrew motions for severance and for trial by jury. In withdrawing the motion for separate trials, counsel for Thomas explained that "[s]ince we are having a Bench Trial, the

Court would only consider the evidence proper to each defendant, we feel that there is no longer any need for that motion." The Court then asked petitioner's lawyer whether that was her understanding as well. She replied: "Yes, your Honor. I have conferred with Miss Lee. We would ask the Court to consider the evidence separately for each defendant." The judge replied: "It will be done that way."

Neither defendant testified at trial, except on behalf of their respective motions to suppress their statements on the ground that they were given involuntarily, motions that were denied by the trial judge.

At trial both the prosecution and the defendants relied heavily on the confessions. In closing, counsel for petitioner called the court's attention to Lee's confession, and argued that it showed that Lee was "not responsible for the death of Odessa Harris. . . . As I read her statement, she was not personally involved in the stabbing of Odessa Harris. Mr. Thomas was." Counsel maintained that under Illinois law, in order to be guilty of murder a person must be involved before or during the commission of the offense, and that Lee's confession simply could not fairly be read to support such a finding. With respect to Aunt Beedie's killing, counsel urged the court to consider the lesser charge of voluntary manslaughter. According to counsel, Lee's statement indicated that Aunt Beedie had had a knife, that Lee and Aunt Beedie had struggled and that the stabbing occurred as a result of that struggle. Counsel suggested that Lee had acted either upon the "unreasonable belief that her act of stabbing Mattie Darden constituted self-defense" or, in the alternative, that the killing "was the result of a sudden and intense passion resulting from serious provocation."

In rebuttal, the prosecutor described Lee's arguments in support of lesser offenses as "interesting." He answered the suggestion that the evidence showed insufficient intent to support murder by asserting that "once you read the confession of Millie Lee, you will note that she indicates in her statement that before anything begins, . . . that she and Edwin spoke together . . . at which time Edwin asked her, 'Are you ready?' And she, after thinking awhile, said, 'Yes.'" The prosecutor maintained that this exchange, which he incorrectly attributed to Lee's statement, and which had in fact appeared only in Thomas' confession, demonstrated a willingness on the part of Lee to "go through with whatever plan" the two had formulated with respect to the victims, and thus that there had been an agreement to kill. The State also argued in closing—again erroneously drawing from Thomas,' not Lee's confession— that Lee "did in fact aid and assist and encourage this whole operation, by drawing Odessa out of the bedroom"; the prosecutor argued that this was evident from Thomas' statement that it was necessary to kill Odessa in order to go ahead with the plan to kill Aunt Beedie. To prove Lee's intent to kill and to rebut her theories of self-defense and sudden and intense passion, the State pointed to Thomas' assertion that he had asked Lee if she was willing to go through with what they had talked about, and her reply "I'm scared, but I will go through with it."[3]

In finding Lee guilty of the murders of Aunt Beedie and Odessa, and explaining why he rejected Lee's assertions that she had not participated in the killing of Odessa and that she acted either in self-defense or under intense and sudden passion with respect to the stabbing of Aunt Beedie, the trial judge expressly relied on Thomas' confession and his version of the killings, particularly with respect to the decision to kill Aunt Beedie allegedly made earlier by Lee and Thomas. Lee's contentions, the judge declared, were:

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[3] It is evident that the prosecutor, in arguing Lee's guilt, invited the court to consider Thomas' confession, an invitation that the court accepted and which generated the error that we address in this opinion. However, there has been no claim made regarding the significance, if any, of prosecutorial misconduct or mistake that results in inadmissible hearsay evidence being brought to the attention of the factfinder, and we thus do not address the question.

> "disputed by the statement of her co-defendant, who stated that he asked Miss Lee do you want to go through with it. A previously conceived plan to dispose of Miss Darden. And after some thinking . . . she responded that she did. There is no showing that they acted under a sudden and intense passion, in fact prior to the stabbing, according to his own confession, the defendant took a knife . . . and awaited the arrival of Miss Harris into the kitchen, in fact had his co-defendant call her so she could come out. Now that isn't a sudden and intense passion."

Lee was sentenced to a term of 40 years' incarceration for the murder of Odessa, and life imprisonment for the murder of Aunt Beedie.

On appeal, Lee contended, among other things, that her Confrontation Clause rights were violated by the trial court's consideration of Thomas' confession against her. The state appeals court conceded that the trial court considered Thomas' confession in finding Lee guilty, but held that since the defendants' confessions were "interlocking," they did not fall within the rule of *Bruton* v. *United States*, 391 U. S. 123 (1968), which, the court stated, was that the "admission of a codefendant's extrajudicial statement that inculpates the other defendant violates the defendant's Sixth Amendment right to confront witnesses against him." The court did not explain what it meant by saying that the confessions were "interlocking," how the confessions interlocked, or how or why the *Bruton* analysis would be altered when confessions did interlock. The Illinois Supreme Court denied leave to appeal. We granted certiorari. 473 U. S. —— (1985).

II

The State of Illinois concedes that this case involves the use of a codefendant's confession as substantive evidence against petitioner. Brief for Respondent at 9. Illinois also correctly recognizes that the admissibility of the evidence as a matter of state law is not the issue in this case; rather, it properly identifies the question presented to be "whether that substantive use of the hearsay confession denied Petitioner rights guaranteed her under the Confrontation Clause. . . ." *Id.*, at 11. It contends, in essence, that Lee's Sixth Amendment rights were not violated because Thomas was unavailable and his statement was "reliable" enough to warrant its untested admission into evidence against Lee. See *Ohio* v. *Roberts*, 448 U. S. 56 (1980). We need not address the question of Thomas' availability, for we hold that Thomas' statement, as the confession of an accomplice, was presumptively unreliable and that it did not bear sufficient independent "indicia of reliability" to overcome that presumption.

A

In *Pointer* v. *Texas*, 380 U. S. 400 (1965), this Court unanimously held that the Confrontation Clause was applicable to the States, and in doing so, remarked that it "cannot seriously be doubted at this late date that the right of cross-examination is included in the right of an accused in a criminal case to confront the witnesses against him." *Id.*, at 404. Citing and quoting from such cases as *Kirby* v. *United States*, 174 U. S. 47 (1899), *Alford* v. *United States*, 282 U. S. 687 (1931), *Greene* v. *McElroy*, 360 U. S. 474 (1959), *In re Oliver*, 333 U. S. 257 (1948), and *Turner* v. *Louisiana*, 379 U. S. 466 (1965), we observed that "[t]here are few subjects, perhaps, upon which this Court and other courts have been more nearly unanimous than in the expressions of belief that the right to confrontation and cross-examination is an essential and fundamental requirement for the kind of fair trial which is this country's constitutional goal." *Pointer*, *supra*, at 405.

On one level, the right to confront and cross-examine adverse witnesses contributes to the establishment of a system of criminal justice in which the perception as well as the reality of fairness prevails. To foster such a system, the Constitution provides certain safeguards to promote to the greatest possible degree society's interest in having the accused and accuser engage in an open and even contest in a public trial. The Confrontation Clause advances these goals by ensuring that convictions will not be based on the charges of unseen and unknown--and hence unchallengeable--individuals.

But the confrontation guarantee serves not only symbolic goals. The right to confront and to cross-examine witnesses is primarily a functional right that promotes reliability in criminal trials. In *California* v. *Green*, 399 U. S. 149, 158 (1970), we identified how the mechanisms of confrontation and cross-examination advance the pursuit of truth in criminal trials. Confrontation, we noted,

> "(1) insures that the witness will give his statements under oath--thus impressing him with the seriousness of the matter and guarding against the lie by the possibility of a penalty for perjury; (2) forces the witness to submit to cross-examination, the 'greatest legal engine ever invented for the discovery of truth'; (3) permits the jury that is to decide the defendant's fate to observe the demeanor of the witness making his statement, thus aiding the jury in assessing his credibility." (footnote omitted).

Our cases recognize that this truthfinding function of the Confrontation Clause is uniquely threatened when an accomplice's confession is sought to be introduced against a criminal defendant without the benefit of cross-examination. As has been noted, such a confession "is hearsay, subject to all the dangers of inaccuracy which characterize hearsay generally . . . More than this, however, the post-arrest statements of a codefendant have traditionally been viewed with special suspicion. Due to his strong motivation to implicate the defendant and to exonerate himself, a codefendant's statements about what the defendant said or did are less credible than ordinary hearsay evidence." *Bruton* v. *United States*, 391 U. S., at 141 (WHITE, J., dissenting)(citations omitted).

Thus, in *Douglas* v. *Alabama*, *supra*, we reversed a conviction because a confession purportedly made by the defendant's accomplice was read to the jury by the prosecutor. Because the accomplice in that case, while called to the witness stand, invoked his privilege against self-incrimination and refused to answer questions put to him, we held that the defendant's "inability to cross-examine [the accomplice] as to the alleged confession plainly denied him the right of cross-examination secured by the Confrontation Clause." *Id.*, at 419. This holding, on which the Court was unanimously agreed, was premised on the basic understanding that when one person accuses another of a crime under circumstances in which the declarant stands to gain by inculpating another, the accusation is presumptively suspect and must be subjected to the scrutiny of cross-examination.

Over the years since *Douglas*, the Court has spoken with one voice in declaring presumptively unreliable accomplices' confessions that incriminate defendants. Even Justice Harlan, who was generally averse to what he regarded as an expansive reading of the confrontation right, stated that he "would be prepared to hold as a matter of due process that a confession of an accomplice resulting from formal police interrogation cannot be introduced as evidence of the guilt of an accused, absent some circumstance indicating authorization or adoption." *Dutton* v. *Evans*, 400 U. S. 74, 98 (1970) (concurring in the judgment).

Our ruling in *Bruton* illustrates the extent of the Court's concern that the admission of this type of evidence will distort the truthfinding process. In *Bruton*, we held that the Confrontation Clause rights of the petitioner were violated when his codefendant's confession was admitted at their joint trial, despite the fact that the judge in that case had carefully instructed the jury that the confession was admissible only against the codefendant. We based our decision in *Bruton* on the fact that a confession that incriminates an accomplice is so "inevitably suspect" and "devastating" that the ordinarily sound assumption that a jury will be able to follow faithfully its instructions could not be applied. *Bruton*, *supra*, at 136.

Although in the present case the state court apparently relied on *Bruton* in reaching its decision, this is not strictly speaking a *Bruton* case because we are not here concerned with the effectiveness of limiting instructions in preventing spill-over prejudice to a defendant when his codefendant's confession is admitted against the codefendant at a joint trial. Rather, this case is strikingly similar to *Douglas*. Here, as in *Douglas*, the state sought to use hearsay evidence as substantive evidence against the accused. In both cases, the hearsay in question was a confession made by an alleged accomplice, and in neither case was the defendant able to confront and cross-examine the declarant. Whatever differences there are between the cases show clearly that in the present case the Confrontation Clause concerns are of even greater consequence than in *Douglas*. In *Douglas*, the accomplice's confession was read by the prosecutor to the uncooperative declarant in order to "refresh his recollection," and was thus technically not evidence that was admitted against the accused; in the present case, Thomas' statement was, of course, admitted into evidence by the judge following a suppression hearing. Moreover, here, unlike *Douglas*, it is not necessary to speculate as to whether the factfinder would consider the uncross-examined hearsay; the judge expressly so relied. In this case the Court does not address a hypothetical. The danger against which the Confrontation Clause was erected--the conviction of a defendant based, at least in part, on presumptively unreliable evidence--actually occurred.

B

Illinois contends that Thomas' statement bears sufficient "indicia of reliability" to rebut the presumption of unreliability that attaches to codefendants' confessions, citing as support our decision in *Ohio* v. *Roberts*, 448 U. S. 56, 66 (1980)(citations omitted). While we agree that the presumption may be rebutted, we are not persuaded that it has been in this case.

In *Roberts*, we recognized that even if certain hearsay[4] evidence does not fall within "a firmly rooted hearsay exception" and is thus presumptively unreliable and inadmissible for Confrontation Clause purposes, it may nonetheless meet Confrontation Clause reliability standards if it is supported by a "showing of particularized guarantees of trustworthiness." 448 U. S., at 66. However, we also emphasized that "[r]eflecting its underlying purpose to augment accuracy in the factfinding process by ensuring the defendant an effective means to test adverse evidence, the Clause countenances only hearsay marked with such trustworthiness that 'there is no material departure from the reason of the general rule.'" *Id.*, at 65, quoting *Snyder* v. *Massachusetts*, 291 U. S. 97, 107 (1934). Illinois' asserted grounds for holding Thomas' statement to be reliable with respect to Lee's culpability simply do not meet this standard.[5]

First, contrary to Illinois' contention, the circumstances surrounding the confession do not rebut the presumption that Thomas' statement could not be trusted as regards Lee's participation in the murders. When Thomas was taken in for questioning and read his rights he refused to talk to the police. The confession was elicited only after Thomas was told that Lee had already implicated him and only after he was implored by Lee to share "the rap" with her. The unsworn statement was given in response to the questions of police, who, having already interrogated Lee, no doubt knew what they were looking for, and the statement was not tested in any manner by contemporaneous cross-examination by counsel, or its equivalent. Although, as the State points out, the confession was found to be voluntary for Fifth Amendment purposes, such a finding does not bear on the question of whether the confession was also free from any desire, motive or impulse Thomas may have had either to mitigate the appearance of his own culpability by spreading the blame or to overstate Lee's involvement in retaliation for her having implicated him in the murders. It is worth noting that the record indicates that Thomas not only had a theoretical motive to distort the facts to Lee's detriment, but that he was actively considering the possibility of becoming her adversary: prior to trial, Thomas contemplated becoming a witness for the State against Lee. This record evidence documents a reality of the criminal process, namely that once partners in a crime recognize that the "jig is up," they tend to lose any identity of interest and immediately become antagonists, rather than accomplices.

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[4] We have previously turned to McCormick's definition of hearsay as "testimony in court, or written evidence, of a statement made out of court, the statement being offered as an assertion to show the truth of matters asserted therein, and thus resting for its value upon the credibility of the out-of-court asserter." E. Cleary, McCormick on Evidence § 246, p. 584. (2d ed. 1972) We have also quoted approvingly McCormick's caveat that "[s]implification has a measure of falsification." *Ibid.* (quoted in *Ohio* v. *Roberts*, 448 U. S. 56, 62, n. 4 (1980)).

[5] We reject respondent's categorization of the hearsay involved in this case as a simple "declaration against penal interest." That concept defines too large a class for meaningful Confrontation Clause analysis. We decide this case as involving a confession by an accomplice which incriminates a criminal defendant.

We also reject Illinois' second basis for establishing reliability, namely that because Lee and Thomas' confessions "interlock" on some points, Thomas' confession should be deemed trustworthy in its entirety. Obviously, when codefendants' confessions are identical in all material respects, the likelihood that they are accurate is significantly increased. But a confession is not necessarily rendered reliable simply because some of the facts it contains "interlock" with the facts in the defendant's statement. See *Parker* v. *Randolph*, 442 U. S. 62, 79 (1979) (BLACKMUN, J., concurring in part and concurring in the judgment). The true danger inherent in this type of hearsay is, in fact, its selective reliability. As we have consistently recognized, a codefendant's confession is presumptively unreliable as to the passages detailing the defendant's conduct or culpability because those passages may well be the product of the codefendant's desire to shift or spread blame, curry favor, avenge himself, or divert attention to another. If those portions of the codefendant's purportedly "interlocking" statement which bear to any significant degree on the defendant's participation in the crime are not thoroughly substantiated by the defendant's own confession, the admission of the statement poses too serious a threat to the accuracy of the verdict to be countenanced by the Sixth Amendment. In other words, when the discrepancies between the statements are not insignificant, the codefendant's confession may not be admitted.

In this case, the confessions overlap in their factual recitations to a great extent. However, they clearly diverge with respect to Lee's participation in the planning of her Aunt's death, Lee's facilitation of the murder of Odessa, and certain factual circumstances relevant to the couple's premeditation. For example, Lee's confession states that Thomas was "talking about doing something to aunt Beetty but he never said what," App. at 12, and does not refer at all to the joint plan to do "something to Aunt Beedie" which Thomas repeatedly mentions in his confession. *Id.*, at 17. Nor does Lee's confession give any indication that Lee and Thomas colluded to "do somthing [sic] with Odessa," *id.*, at 18, as does Thomas' statement. Lee states that she called Odessa into the kitchen only to discuss the rent and that Thomas assaulted Odessa after Odessa had left the kitchen, given Thomas a "dirty loo[k]," and was walking toward the bedroom. *Id.*, at 6. By contrast, Thomas indicates that "[Lee] was suppose [sic] to get Odessa to stand, with her back toward the front room, looking into the kitchen" so that Thomas could stab her from the back, *id.*, at 18, and that he actually attacked Odessa while she was in the kitchen at Lee's beckoning. *Id.*, at 19. Finally, there are certain factual discrepancies in the two statements which bear on Lee's alleged pre-existing intent to kill the two women. For example, Thomas states that the couple had thought to put on gloves before the killings, *id.*, at 20, while Lee states that they put on gloves only to dispose of the bodies. *Id.*, at 10.

The subjects upon which these two confessions do not "interlock" cannot in any way be characterized as irrelevant or trivial. The discrepancies between the two go to the very issues in dispute at trial: the roles played by the two defendants in the killing of Odessa, and the question of premeditation in the killing of Aunt Beedie.

In sum, we are not convinced that there exist sufficient "indicia of reliability," flowing from either the circumstances surrounding the confession or the "interlocking" character of the confessions, to overcome the weighty presumption against the admission of such uncross-examined evidence. We therefore hold that on the record before us, there is no occasion to depart from the time honored teaching that a codefendant's confession inculpating the accused is inherently unreliable, and that convictions supported by such evidence violate the constitutional right of confrontation.[6]

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[6] Illinois makes the somewhat surprising argument—an argument, incidentally, that was not made before the state court—that this case does not present any Confrontation Clause issue since Lee was afforded an opportunity to cross-examine Thomas during the suppression hearing. We disagree.

The function of a suppression hearing is to determine the voluntariness, and hence the admissibility for Fifth Amendment purposes, of a confession. The truth or falsity of the statement is not relevant to the voluntariness inquiry, and no such testimony was given by Thomas. Counsel for both Lee and Thomas specifically stated that their clients were testifying "for purposes of the motion to suppress the confession only." Tr. 205, 219. Before either defendant took the stand, the court announced, "Let the record show the testimony of this defendant will be used solely for the purpose of sustaining the motion to suppress previously made." *Id.*, at 205.

Thus, there was no opportunity to cross-examine Thomas with respect to the reliability of the statement, especially as it may have related to Lee, and thus no opportunity for cross-examination sufficient to satisfy the demands of the Confrontation Clause. Cf. *Jackson* v. *Denno*, 378 U. S. 368, By holding that the consideration of Thomas' untested confession against Lee violated Lee's Confrontation Clause rights, we do not foreclose the possibility that this error was harmless when assessed in the context of the entire case against Lee. See *Schneble* v. *Florida*, 405 U. S. 427 (1972). However, because the Illinois courts are in a better position to assess the remaining evidence in light of the substantive state law of murder, we leave this determination in the first instance to the state courts. Accordingly, the judgment of the Appellate Court of Illinois, Fifth Judicial Circuit, is reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

376–377 (1964) (A defendant's constitutional right to a hearing to object to the use of a confession involves a determination of voluntariness, "a determination uninfluenced by the truth or falsity of the confession").

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SUPREME COURT OF THE UNITED STATES

No. 84-6807

MILLIE R. LEE, PETITIONER *v.* ILLINOIS

ON WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, FIFTH DISTRICT

[June 3, 1986]

JUSTICE BLACKMUN, with whom THE CHIEF JUSTICE, JUSTICE POWELL, and JUSTICE REHNQUIST join, dissenting.

I yield to no one in my respect for the Confrontation Clause of the Sixth Amendment, made applicable to the States through the Fourteenth. And I do not denigrate the lofty precepts that have been developed to strengthen its enforcement. I feel, however, that at times this Court tends to be overly concerned with theory and pronounced principles for their own sake, and to disregard the significant realities that so often characterize a criminal case. There is a real world as well as a theoretical one.

This case, centering on two senseless and reprehensible East Saint Louis murders, is illustrative. Petitioner Millie R. Lee and her friend and codefendant, Edwin R. Thomas, each confessed to extensive and cooperative involvement in the crimes. Their corroborated and mutually reinforcing statements stand in vivid contrast to the blame-it-on-the-other-person and buck-passing posturing that usually develops when criminal accomplices are apprehended and each endeavors to rescue himself or herself at the expense of the other. We have nothing of that kind here.

I agree with the Court that this case is governed by *Ohio* v. *Roberts*, 448 U. S. 56 (1980). Under the principles enunciated in that case, Thomas' confession was constitutionally admissible against petitioner *only* if Thomas was "unavailable" as a witness *and* the confession bore sufficient "indicia of reliability." *Id.*, at 65–66. These two requirements serve to ensure that an out-of-court statement is admitted only when it does not threaten the central mission of the Confrontation Clause, which is "to advance a practical concern for the accuracy of the truth-determining process in criminal trials by assuring that 'the trier of fact [has] a satisfactory basis for evaluating the truth of the prior statement.'" *Dutton* v. *Evans*, 400 U. S. 74, 89 (1970) (plurality opinion), quoting *California* v. *Green*, 399 U. S. 149, 161 (1970). Because I believe that each of the *Roberts* requirements was satisfied in this case, I conclude that the trial court's use of the accomplice's confession as evidence against petitioner was constitutionally permissible.[1]

I

Recognizing "the Framers' preference for face-to-face accusation," this Court has construed the Confrontation Clause to embody in general "a rule of necessity." *Ohio* v. *Roberts*, 448 U. S., at 65. When a witness is available to testify in court, his prior statement, even if reliable, generally will be inadmissible to prove the truth of what it asserts unless the witness is produced for cross-examination. See *California* v. *Green*, 399 U. S., at 158; *Barber* v. *Page*, 390 U. S. 719 (1968). "In the usual case . . . the prosecution must either produce, or demonstrate the unavailability of, the declarant whose statement it wishes to use against the defendant." *Roberts*, 448 U. S., at 65.[2]

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[1] As the Court points out, *ante*, at 8–9, the admissibility of Thomas' confession under Illinois law is not the issue in this case and does not control the question of constitutional admissibility.

[2] As this Court recently explained in *United States* v. *Inadi*, —— U. S. —— (1986), a specific showing of unavailability is not always required. I nonetheless assume, for purposes of discussion, that in relevant respects Thomas' custodial confession is more like the prior judicial testimony at issue in *Roberts* than like the contemporaneous co-conspirator statements involved in *Inadi*, and thus that both *Roberts* requirements had to be satisfied.

For all practical purposes, Thomas was unavailable as a prosecution witness. Although physically present in the courtroom, he clearly would have invoked his privilege against self-incrimination if called to the stand to describe the murders he had committed with petitioner.[3] Indeed, it is precisely Thomas' Fifth Amendment privilege that brought the Confrontation Clause into this case in the first place: although the State "produced" Thomas in court, his right not to testify against himself made him effectively unavailable for cross-examination by petitioner. See *Douglas* v. *Alabama*, 380 U. S. 415, 419 (1965). In much the same way, Thomas' testimony was unavailable to the State. See *Phillips* v. *Wyrick*, 558 F. 2d 489, 494 (CA8 1977), cert. denied, 434 U. S. 1088 (1978).

Illinois, of course, had weapons that petitioner lacked. For example, the State could have offered Thomas a favorable sentencing recommendation, or the opportunity to plead guilty to a lesser offense, in exchange for his testimony against petitioner. Alternatively, the State could have tried Thomas separately and granted him immunity from the use of his inculpatory testimony against petitioner. See *Kastigar* v. *United States*, 406 U. S. 441 (1972). Measures of this kind, however, entail significant costs. A plea agreement necessarily compromises the community's legitimate correctional interests, and a grant of immunity places a heavy evidentiary burden on any future prosecution of the witness. See *id.*, at 460–461. I cannot conclude that the possibility of such an arrangement with petitioner's codefendant rendered him an available witness for purposes of the Confrontation Clause.

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[3] Because the State did not call Thomas to testify, he did not expressly invoke his Fifth Amendment privilege. In the circumstances of this case, however, the absence of this formality is not decisive. Cf. *United States* v. *Thomas*, 571 F. 2d 285, 288 (CA5 1978). Not only would such an effort by the State have been futile, but Thomas' presence in the courtroom made him as available to petitioner as to the prosecution. Thus, in the exceedingly unlikely event that Thomas would have testified if called, there was no significant denial of petitioner's right to confrontation, because petitioner herself could have called Thomas and questioned him, if necessary, as an adverse witness. The Confrontation Clause does not require that cross-examination actually occur; it requires only that a defendant be given the opportunity for cross-examination or its functional equivalent. See *Ohio* v. *Roberts*, 448 U. S. 56, 70–71 (1980).

My unwillingness reflects in part a respect for established principles of the law of evidence. Although the Confrontation Clause differs in significant ways from the common-law rule against the introduction of hearsay, the two "stem from the same roots," *Dutton* v. *Evans*, 400 U. S., at 86 (plurality opinion), and "protect similar values," *California* v. *Green*, 399 U. S., at 155. As a consequence, analysis under the Confrontation Clause properly is informed, although not constrained, by hearsay principles developed over time by courts and legislatures. See, *e. g.*, *Roberts*, 448 U. S., at 66. Among those principles is the generally accepted notion that witnesses who successfully invoke the privilege against self-incrimination are "unavailable" for purposes of determining whether their prior statements are admissible under an exception to the hearsay rule. See *California* v. *Green*, 399 U. S., at 168, n. 17; Fed. Rule Evid. 804(a)(1); E. Cleary, McCormick on Evidence §253 (3d ed. 1984). The judgment embodied in that notion—that a witness who validly invokes the privilege is unavailable as a practical matter to testify—seems to me to be sound, and I see no reason to take a different approach under the Confrontation Clause. I therefore conclude that Thomas was unavailable as a witness.

II

I also conclude, in the circumstances of this case,—and the Court should be realistic about these issues—that the confession of petitioner's codefendant bore adequate "indicia of reliability" to allow its admission into evidence against petitioner. Chief among these indicia is the fact that Thomas' statements were thoroughly and unambiguously adverse to

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his penal interest. See *United States* v. *White*, 553 F. 2d 310, 314 (CA2), cert. denied, 431 U. S. 972 (1977). The hearsay exception for declarations against interest is firmly established; it rests upon "the principle of experience that a statement asserting a fact distinctly against one's interest is unlikely to be deliberately false or heedlessly incorrect." 5 J. Wigmore, Evidence § 1457, p. 329 (J. Chadbourn rev. 1974).[4] Again, I recognize that the requirements of the Confrontation Clause and the hearsay rule often diverge. But statements squarely within established hearsay exceptions possess "the imprimatur of judicial and legislative experience," G. Lilly, An Introduction to the Law of Evidence § 78, pp. 277–278 (1978), and that fact must weigh heavily in our assessment of their reliability for constitutional purposes. See *Roberts*, 448 U. S., at 66.

The majority points out correctly, *ante*, at 10–11, that the Court customarily has treated the confessions of codefendants with suspicion. Never, however, has the Court held such confessions *per se* inadmissible under the Confrontation

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[4] The old view that the interest must be proprietary or pecuniary, not penal, by now has been fully discredited. The refusal of the common law to exempt statements against penal interest from the hearsay rule usually is traced to the decision of the House of Lords in the *Sussex Peerage Case*, 11 Cl. & F. 85, 8 Eng. Rep. 1034 (1844), a case Wigmore describes as "not strongly argued and not considered by the judges in the light of the precedents," 5 J. Wigmore, Evidence § 1476, p. 351 (J. Chadbourn rev. 1974). The doctrine announced there has been termed "barbarous," *id.*, at § 1477, p. 360, and "indefensible in logic," Advisory Committee's Notes on Fed. Rule Evid. 804(b)(3), 28 U. S. C. App., p. 733. The rationale for allowing admission of declarations against interest applies no less forcefully when the declarant concedes criminal intead of civil liability; indeed, "no other confession is so much against interest as a confession of murder." *Donnelly* v. *United States*, 228 U. S. 243, 278 (1913) (Holmes, J., dissenting). Accordingly, most jurisdictions now allow the introduction, in appropriate circumstances, of out-of-court declarations against penal interest. See E. Cleary, McCormick on Evidence § 278 (3d ed. 1984); Fed. Rule Evid. 804(b)(3).

Clause,[5] and the suspicion the Court has shown in no way contradicts the general reliability of statements against penal interest. Indeed, accomplice confessions ordinarily are untrustworthy precisely because they are *not* unambiguously adverse to the penal interest of the declarant. It is of course against one's penal interest to confess to criminal complicity, but often that interest can be advanced greatly by ascribing the bulk of the blame to one's confederates. It is in circumstances raising the latter possibility—circumstances in which the accomplice's out-of-court statements implicating the defendant may be very much in the accomplice's penal interest—that we have viewed the accomplice's statements as "inevitably suspect." *Bruton* v. *United States*, 391 U. S. 123, 136 (1968); see also *id.*, at 141–142 (WHITE, J., dissenting) ("Due to his strong motivation to implicate the defendant and to exonerate himself, a codefendant's statements about what the defendant said or did are less credible than ordinary hearsay evidence.").

Such circumstances were presented starkly in *Douglas* v. *Alabama*, 380 U. S. 415 (1965). The accomplice's confession in that case was "of crucial importance" because it identified the defendant as the triggerman. *Id.*, at 417, and n. 3. Only one shot had been fired, and it obviously was in the accomplice's penal interest to convince the authorities that he was not the one who fired it. By "fingering" the defendant, he minimized his own criminal culpability.

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[5] In *Bruton* v. *United States*, 391 U. S. 123 (1968), the inadmissibility of the codefendant's out-of-court statements against the defendant was not contested; the question was whether limiting instructions were constitutionally adequate to ensure that the jury considered the codefendant's statements only against the codefendant and not against the defendant. See *id.*, at 128, n. 3 ("There is not before us . . . any recognized exception to the hearsay rule . . . and we intimate no view whatever that such exceptions necessarily raise questions under the Confrontation Clause."); see also *Dutton* v. *Evans*, 400 U. S. 74, 86 (1970) (plurality opinion). The *Bruton* rule thus necessarily applies only to situations in which the out-of-court statements are constitutionally inadmissible against the defendant. See *United States* v. *Kelley*, 526 F. 2d 615, 620 (CA8 1975), cert. denied, 424 U. S. 971 (1976).

In the present case, however, there is little reason to fear that Thomas' statements to the police may have been motivated by a desire to shift blame to petitioner. Thomas' confession was less favorable in all respects to his own interests than petitioner's confession, and there is no claim by either side that Thomas actually was more culpable than either he or petitioner admitted. Also, Thomas' description of petitioner's involvement in the murders in no way diminished his own complicity. This is particularly so with respect to the matter for which the trial judge relied on Thomas' confession, namely, the joint planning of the murders. Far from minimizing Thomas' own liability, the claim that the two defendants consulted about the crimes immediately before carrying them out damaged Thomas' defense just as much as petitioner's, and subjected both defendants to possible charges of criminal conspiracy.[6]

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[6] Thomas' statement to the police therefore differs significantly from the typical confession implicating an accomplice. In most cases, the inculpation of the accomplice is "collateral" to the confession, in that the allegations implicating the accomplice are not found in portions of the statement directly adverse to the declarant's penal interest. Comment, Federal Rule of Evidence 804(b)(3) and Inculpatory Statements Against Penal Interest, 66 Calif. L. Rev. 1189, 1190, n. 7 (1978).

Moreover, because Thomas' inculpation of petitioner was inseverable from those portions of the confession strongly adverse to his own penal interests, this case presents no special reason to fear that Thomas implicated petitioner in an effort to curry favor with the police. In theory, of course, the entire confession could have been a misguided effort to please the interrogating officers, see, *e. g.*, *Parker* v. *Randolph*, 442 U. S. 62, 86 and n. 6 (1979) (STEVENS, J., dissenting), but this possibility is present whenever a suspect confesses while in custody, and it renders the confession no less reliable as evidence against a codefendant than as evidence against the confessing suspect. In this case, moreover, the possibility of a false confession is rendered remote by the circumstances of Thomas' confession, and by the extensive corroboration provided by petitioner's own confession and by the physical evidence. See *infra*.

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Not only was Thomas' confession unambiguously adverse to his own penal interest, but it was extensively corroborated by other evidence introduced at trial. Perhaps the strongest corroboration was provided by petitioner's own confession, which mirrors Thomas' statement in striking detail. Both defendants independently told the police that the murders took place after Odessa Harris came into the kitchen to complain about their arguing. App. 6 (petitioner's confession) ("Odessa . . . asked what the hell was going on."); *id.*, at 17 (Thomas' confession) ("Odessa . . . asked, 'what's the hell going on?'"). Both defendants explained that Harris then returned to the bedroom, and that petitioner called her back to the kitchen, at which time Thomas rose from a recliner and stabbed her in the back with a long-blade knife. *Id.*, at 6–7, 18–19. According to both confessions, Odessa Harris fell to the floor and began to call for petitioner's aunt, Mattie Darden, whom petitioner then intercepted in the bedroom with a knife. *Id.*, at 7, 19. Both defendants agreed that while petitioner was in the bedroom she asked Thomas for the hammer, that Thomas could not find it, that petitioner asked Thomas to bring a skillet from the kitchen, that Thomas did so, and that the skillet fractured after petitioner struck Darden on the head with it once or twice. *Id.*, at 7, 20. They agreed that Thomas then brought another skillet from the kitchen, that petitioner hit her aunt once more on the head, spraying grease about the room, and that Thomas took over after telling petitioner she was not hitting hard enough. *Id.*, at 8, 20. Both defendants said they had spoken in the past about doing something to stop Darden from harassing petitioner. *Id.*, at 12, 17.[7]

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[7] The confessions further agree on the details of the defendants' activities following the murders, the broad outlines of which were as follows: Petitioner and Thomas put Harris' body inside a trunk they found in Darden's bedroom and left the trunk outside by the trash. Petitioner went to a local store to buy lighter fluid, with which she and Thomas set the trunk on fire. Using clothes line and a long aluminum lawn chair, they carried Darden to

The two confessions, of course, were not identical as to every detail. One could not expect them to be. In particular, the discussion just before the killings, on which the trial judge relied in rejecting petitioner's defense of "sudden and intense passion," was described only in Thomas' statement. For at least two reasons, however, this divergence does not significantly undermine the corroboration provided by petitioner's confession. First, although petitioner did not mention the discussion described by Thomas, the story she told was in no way inconsistent with the occurrence of such a discussion. Nothing she said suggested that joint planning of the kind described by Thomas had *not* taken place. Second, as noted above, Thomas' assertion that he and petitioner consulted immediately before the murders cannot be understood as an attempt to shift blame from Thomas to petitioner. Far from diminishing Thomas' culpability, that assertion increased his potential liability just as much as it did petitioner's.[8]

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a vacant apartment. They cleaned the floors of Darden's apartment. The following day, they transfered Harris' remains to a cardboard stereo box, leaving the box with the garbage. Thomas later returned to the vacant apartment and set fire to Darden's body. App. 8–11, 20–24.

[8] The Court in the past has divided on the significance of "interlocking" confessions for the rule announced in *Bruton* v. *United States*, 391 U. S. 123 (1968). Compare *Parker* v. *Randolph*, 442 U. S. 62, 74–75 (1979) (plurality opinion) (*Bruton* rule is inapplicable to cases involving interlocking confessions), with *id.*, at 77–81 (opinion concurring in part and concurring in the judgment) (interlocking confessions may make *Bruton* error harmless but do not render the rule inapplicable), and *id.*, at 81–83 (STEVENS, J., dissenting) (same). Since *Bruton* applies only in cases where the codefendant's out-of-court statements are inadmissible against the defendant, see n. 5, *supra*, the views I expressed in *Randolph* necessarily imply, as the Court suggests, that interlocking confessions are not automatically admissible against both defendants. See *ante*, at 14. I adhere to that position. It hardly follows, however, that the corroboration provided by a defendant's own confession is *irrelevant* to a determination whether a codefendant's out-of-court statements are sufficiently reliable to be admissible against the defendant under the Confrontation Clause. Any categorical approach of that kind seems to me to be profoundly unwise.

In addition to the corroboration provided by petitioner's own confession, the statements given by petitioner and Thomas were fully consistent with the physical evidence. The knives used in the attacks were found where petitioner said they were hidden. See Tr. 183–184. The police also found, among other evidence, the can of lighter fluid used to ignite the bodies of both victims, see *id.*, at 21–22, the broken skillet, see *id.*, at 41–42, and both victims' remains, see *id.*, at 17–18, 67–71, 78–82, 155–157. The wounds found on Darden's body were fully in accord with the story told by both defendants. See *id.*, at 77–78.

Finally, the record amply supports the trial court's determination that the confessions were voluntary. Although petitioner and Thomas were in custody when they gave their statements, each was fully notified of his or her rights, and there is no indication of any police pressure. The interrogating officers testified at trial that the defendants appeared alert and sober during questioning, and that they were not threatened or cajoled by the police in any way. See *id.*, at 30–31, 37–38, 94–96, 104–106.

It is the unusual conjunction of these indicia of reliability—thorough and unambiguous adversity to Thomas' penal interest, extensive and convincing corroboration by petitioner's own confession, further corroboration provided by the physical evidence, and reliable evidence of voluntariness—that persuades me in this case that the *de facto* admission of the confession of an unavailable witness as substantive evidence against petitioner did not violate the Confrontation Clause. Were any of these elements missing, the result might be different and I might well agree with the Court. Together, however, they kept this trial within constitutional bounds.

III

The Court's cases have construed the Confrontation Clause in a pragmatic fashion, requiring "substantial compliance" with its purposes, see *Ohio* v. *Roberts*, 448 U. S., at 69; *Cali-*

fornia v. *Green*, 399 U. S., at 166, but acknowledging the need to balance the interests of the accused against the public's "strong interest in effective law enforcement," *Roberts*, 448 U. S., at 64; see also *Mattox* v. *United States*, 156 U. S. 237, 243 (1895). I share the Court's general concern regarding the use of an accomplice's confession as evidence against an accused, but I believe that in this case the practical unavailability of petitioner's codefendant as a witness for the State, together with the unusually strong and convincing indications that his statements to the police were reliable, rendered the confession constitutionally admissible against petitioner.

I respectfully dissent.

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(Slip Opinion)

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Lumber Co.*, 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

CON

Syllabus

DARDEN *v.* WAINWRIGHT, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 85–5319. Argued January 13, 1986—Decided June 23, 1986

After a jury trial in a Florida court, petitioner was found guilty of murder, robbery, and assault with intent to kill. Pursuant to Florida's capital sentencing statute, the same jury heard further testimony and argument, and made a nonbinding recommendation that the death penalty be imposed. The trial judge followed that recommendation, and the Florida Supreme Court affirmed the conviction and the sentence, rejecting petitioner's contention that the prosecution's closing argument during the guilt phase of the trial rendered the trial fundamentally unfair and deprived the sentencing determination of the reliability required by the Eighth Amendment. The court also rejected petitioner's contention that the trial court erred in excluding a member of the venire for cause on the basis of his affirmative response to the judge's question during *voir dire* "Do you have any moral or religious, conscientious moral or religious principles in opposition to the death penalty so strong that you would be unable without violating your own principles to vote to recommend a death penalty regardless of the facts?" In subsequent federal habeas corpus proceedings, petitioner raised the same claims, as well as the additional claim that he had been denied effective assistance of counsel at the sentencing phase of his trial. The District Court denied relief, and the Court of Appeals ultimately affirmed the District Court's judgment in all of its aspects.

Held:

1. The record of the jury *voir dire*, viewed in its entirety, shows that the trial court's decision to exclude the juror involved here was proper. *Wainwright* v. *Witt*, 469 U. S. 412, held that the proper test is whether a juror's views on capital punishment would prevent or substantially impair the performance of his duties as a juror in accordance with his in-

structions and his oath. Petitioner's argument on this issue rested solely on the wording of the question (quoted above) that the trial court asked the juror before excluding him. However, a proper determination of the issue requires examination of the context surrounding the juror's exclusion. The record shows that prior to individual questioning the trial court told the entire venire that they would be questioned on this point, and that the juror in question was present while the court repeatedly stated the correct standard when questioning other individual members of the panel. Pp. 6–9.

2. The record also supports the rejection of petitioner's contention as to the prosecution's closing argument. The prosecution's argument included improper remarks that indicated that petitioner was on weekend furlough from an earlier prison sentence when the crime involved here occurred; implied that the death penalty would be the only guarantee against a future similar act; referred to petitioner as an "animal"; and reflected an emotional reaction to the case. However, the relevant question is whether the comments so infected the trial with unfairness as to make the resulting conviction a denial of due process. Viewed under this standard, the prosecution's comments did not deprive petitioner of a fair trial. The comments did not manipulate or misstate the evidence, or implicate other specific rights of the accused, and much of their objectionable content was responsive to the opening summation of the defense (available under a state procedural rule). Moreover, defense counsel were able to use their final rebuttal argument to turn much of the prosecution's closing argument against it. Pp. 9–14.

3. With respect to the claim of ineffective of counsel at the sentencing phase of the trial, petitioner failed to satisfy the first part of the two-part test set forth in *Strickland* v. *Washington*, 466 U. S. 668, that his trial counsels' performance fell below an objective standard of reasonableness. There is no merit to petitioner's contention that trial counsel devoted only the time between the close of the guilt phase of trial and the start of the penalty phase—approximately one-half hour—to prepare the case in mitigation. The record indicates that a great deal of time and effort went into the defense of this case; a significant portion of that time was devoted to preparation for sentencing. Moreover, a defendant must overcome the presumption that, under the circumstances, the challenged action of counsel might be considered sound trial strategy. Petitioner did not overcome that presumption here. The record shows several reasons why counsel reasonably could have chosen to rely on a simple plea for mercy from petitioner himself, rather than to attempt to introduce mitigating evidence. Pp. 15–18.

767 F. 2d 752, affirmed and remanded.

Syllabus

POWELL, J., delivered the opinion of the Court, in which BURGER, C. J., and WHITE, REHNQUIST, and O'CONNOR, JJ., joined. BURGER, C. J., filed a concurring opinion. BRENNAN, J., filed a dissenting opinion. BLACKMUN, J., filed a dissenting opinion, in which BRENNAN, MARSHALL, and STEVENS, JJ., joined.

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D. C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

No. 85-5319

WILLIE JASPER DARDEN, PETITIONER *v.* LOUIE L. WAINWRIGHT, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

[June 23, 1986]

JUSTICE POWELL delivered the opinion of the Court.

This case presents three questions concerning the validity of petitioner's criminal conviction and death sentence: (i) whether the exclusion for cause of a member of the venire violated the principles announced in *Wainwright* v. *Witt*, 469 U. S. —— (1985); (ii) whether the prosecution's closing argument during the guilt phase of a bifurcated trial rendered the trial fundamentally unfair and deprived the sentencing determination of the reliability required by the Eighth Amendment; and (iii) whether petitioner was denied effective assistance of counsel at the sentencing phase of his trial.

I

Petitioner was tried and found guilty of murder, robbery, and assault with intent to kill in the Circuit Court for Citrus County, Florida, in January 1974. Pursuant to Florida's capital sentencing statute, the same jury that convicted petitioner heard further testimony and argument in order to make a nonbinding recommendation as to whether a death sentence should be imposed. The jury recommended a death sentence, and the trial judge followed that recommendation. On direct appeal, the Florida Supreme Court affirmed the conviction and the sentence. Petitioner made several of the same arguments in that appeal that he makes here. With respect to the prosecutorial misconduct claim, the court disapproved of the closing argument, but reasoned that the law required a new trial "only in those cases in which it is reasonably evident that the remarks might have influenced the jury to reach a more severe verdict of guilt . . . or in which the comment is unfair." *Darden* v. *State*, 329 So. 2d 287, 289 (Fla. 1976). It concluded that the comments had not rendered petitioner's trial unfair. Petitioner's challenge to the juror exclusion was rejected without comment. Petitioner did not at that time raise his claim of ineffective assistance of counsel. This Court granted certiorari, 429 U. S. 917 (1976), limited the grant to the claim of prosecutorial misconduct, 429 U. S. 1036 (1976), heard oral argument, and dismissed the writ as improvidently granted, 430 U. S. 704 (1977).

Petitioner then sought federal habeas corpus relief, raising the same claims he raises here. The District Court denied the petition. *Darden* v. *Wainwright*, 513 F. Supp. 947 (MD Fla. 1981). A divided panel of the Court of Appeals for the Eleventh Circuit affirmed. 699 F. 2d 1031 (CA11 1983). The Court of Appeals granted rehearing *en banc*, and affirmed the District Court by an equally divided court. 708 F. 2d 646 (CA11 1983). Following a second rehearing *en banc* the Court of Appeals reversed on the claim of improper excusal of a member of the venire. 725 F. 2d 1526 (CA11 1985). This Court granted the State's petition for certiorari on that claim, vacated the Court of Appeals' judgment and remanded for reconsideration in light of *Wainwright* v. *Witt*. 469 U. S. —— (1985). On remand, the *en banc* court denied relief, 767 F. 2d 752 (CA11 1985). Petitioner filed an application for a stay of his execution that this Court treated as a petition for certiorari and granted, at the same time staying his execution. 473 U. S. —— (1985). We now affirm.

II

Because of the nature of petitioner's claims, the facts of this case will be stated in more detail than is normally necessary in this Court. On September 8, 1973, at about 5:30 p. m., a black adult male entered Carl's Furniture Store near Lakeland, Florida. The only other person in the store was the proprietor, Mrs. Turman, who lived with her husband in a house behind the store. Mr. Turman, who worked nights at a juvenile home, had awakened at about 5:00 p. m., had a cup of coffee at the store with his wife, and returned home to let their dogs out for a run. Mrs. Turman showed the man around the store. He stated that he was interested in purchasing about $600 worth of furniture for a rental unit, and asked to see several different items. He left the store briefly, stating that his wife would be back to look at some of the items.

The same man returned just a few minutes later asking to see some stoves, and inquiring about the price. When Mrs. Turman turned toward the adding machine, he grabbed her and pressed a gun to her back, saying "Do as I say and you won't get hurt." He took her to the rear of the store and told her to open the cash register. He took the money, then ordered her to the part of the store where some boxsprings and mattresses were stacked against the wall. At that time Mr. Turman appeared at the back door. Mrs. Turman screamed while the man reached across her right shoulder and shot Mr. Turman between the eyes. Mr. Turman fell backwards, with one foot partially in the building. Ordering Mrs. Turman not to move, the man tried to pull Mr. Turman into the building and close the door, but could not do so because one of Mr. Turman's feet was caught in the door. The man left Mr. Turman face-up in the rain, and told Mrs. Turman to get down on the floor approximately five feet from where her husband lay dying. While she begged to go to her husband, he told her to remove her false teeth. He unzipped his pants, unbuckled his belt, and demanded that Mrs. Turman perform oral sex on him. She began to cry "Lord, have mercy." He told her to get up and go towards the front of the store.

Meanwhile, a neighbor family, the Arnolds, became aware that something had happened to Mr. Turman. The mother sent her 16 year-old son Phillip, a part-time employee at the furniture store, to help. When Phillip reached the back door he saw Mr. Turman lying partially in the building. When Phillip opened the door to take Turman's body inside, Mrs. Turman shouted "Phillip, no, go back." Phillip did not know what she meant and asked the man to help get Turman inside. He replied, "Sure, buddy, I will help you." As Phillip looked up, the man was pointing a gun in his face. He pulled the trigger and the gun misfired; he pulled the trigger again and shot Phillip in the mouth. Phillip started to run away, and was shot in the neck. While he was still running, he was shot a third time in the side. Despite these wounds, Phillip managed to stumble to the home of a neighbor, Mrs. Edith Hill. She had her husband call an ambulance while she tried to stop Phillip's bleeding. While she was helping Phillip, she saw a late model green Chevrolet leave the store and head towards Tampa on state highway 92. Phillip survived the incident; Mr. Turman, who never regained consciousness, died later that night.

Minutes after the murder petitioner was driving towards Tampa on highway 92, just a few miles away from the furniture store. He was out on furlough from a Florida prison, and was driving a car borrowed from his girlfriend in Tampa. He was driving fast on a wet road. Petitioner testified that as he came up on a line of cars in his lane, he was unable to slow down. He attempted to pass, but was forced off the road to avoid a head-on collision with an oncoming car. Petitioner crashed into a telephone pole. The driver of the oncoming car, John Stone, stopped his car and went to petitioner to see if he could help. Stone testified that as he approached the car, petitioner was zipping up his pants and buckling his belt. Police at the crash site later identified petitioner's car as a 1969 Chevrolet Impala of greenish golden brown color. Petitioner paid a bystander to give him a ride to Tampa. Petitioner later returned with a wrecker, only to find that the car had been towed away by the police.

By the time the police arrived at the scene of the accident, petitioner had left. The fact that the car matched the description of the car leaving the scene of the murder, and that the accident had occurred within three and one-half miles of the furniture store and within minutes of the murder, led police to suspect that the car was driven by the murderer. They searched the area. An officer found a pistol—a revolver—about forty feet from the crash site. The arrangement of shells within the chambers exactly matched the pattern that should have been found in the murder weapon: one shot, one misfire, followed by three shots, with a live shell remaining in the next chamber to be fired. A specialist for the FBI examined the pistol and testified that it was a Smith & Wesson .38 special revolver. It had been manufactured as a standard .38; it later was sent to England to be rebored, making it a much rarer type of gun than the standard .38. An examination of the bullet that killed Mr. Turman revealed that it came from a .38 Smith & Wesson special.

On the day following the murder petitioner was arrested at his girlfriend's house in Tampa. A few days later Mrs. Turman identified him at a preliminary hearing as her husband's murderer. Phillip Arnold selected petitioner's picture out of a spread of six photographs as the man who had shot him.[1] By that time, a Public Defender had been appointed to represent petitioner.

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[1] There are some minor discrepancies in the eyewitness identification. Mrs. Turman first described her assailant immediately after the murder while her husband was being taken to the emergency room. She told the investigating officer that the attacker was a heavyset man. Record 237. When asked if he was "neat in his appearance, clean-looking, clean-shaven," she responded "[a]s far as I can remember, yes, sir." *Ibid.* She also stated to the officer that she thought that the attacker was about her height, 5'6" tall, and that he was wearing a pullover shirt with a stripe around the neck. Record 227. The first time she saw petitioner after the attack was when she identified him at the preliminary hearing. She had

As petitioner's arguments all relate to incidents in the course of his trial, they will be taken up, together with the relevant facts, in chronological order.

III

Petitioner contends that one member of the venire, Mr. Murphy, was excluded improperly under the test enunciated in *Wainwright* v. *Witt*. That case modified this Court's opinion in *Witherspoon* v. *Illinois*, 391 U. S. 510 (1968). *Witherspoon* had held that potential jurors may be excused for cause when their opposition to the death penalty is such that they automatically would vote against a sentence of death or would be impaired in the task of determining defendant's guilt. *Witt* held that the proper test is whether the juror's views on capital punishment would "prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." 469 U. S., at ——. *Witt* also made clear that the trial judge's determination that a potential juror is impermissibly biased is a factual finding entitled to a presumption of correctness under 28 U. S. C. §2254.

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not read any newspaper accounts of the crime, nor had she seen any picture of petitioner. When she was asked if petitioner was the man who had committed the crimes, she said yes. She also repeatedly identified him at trial.

Phillip Arnold first identified petitioner in a photo line-up while in the hospital. He could not speak at the time, and in response to the written question whether petitioner had a mustache, Phillip wrote back "I don't think so." Record 476. Phillip also testified at trial that the attacker was a heavyset man wearing a dull, light color knit shirt with a ring around the neck. Record 443. He testified that the man was almost his height, about 6'2" tall.

A motorist who stopped at the scene of the accident testified that petitioner was wearing a white or off-grey button-down shirt and that he had a slight mustache. Record 313, 318–320. In fact, the witness stated that he "didn't know it was that [the mustache] or the raindrops on him or not. I couldn't really tell that much to it, it was real thin, that's all." Record 319. Petitioner is about 5'10" tall, and at the time of trial testified that he weighed about 175 pounds.

Petitioner's argument on this issue relies solely on the wording of a question the trial court asked Murphy before excluding him. The court asked, "Do you have any moral or religious, conscientious moral or religious principles in opposition to the death penalty so strong that you would be unable without violating your own principles to vote to recommend a death penalty regardless of the facts?" Record 165. Petitioner argues that this question does not correctly state the relevant legal standard. As *Witt* makes clear, however, our inquiry does not end with a mechanical recitation of a single question and answer. 469 U. S., at ——. We therefore examine the context surrounding Murphy's exclusion to determine whether the trial court's decision that Murphy's beliefs would "substantially impair the performance of his duties as a juror" was fairly supported by the record.

During *voir dire*, but prior to individual questioning on this point, the trial court spoke to the entire venire, including Murphy, saying:

> "Now I am going to ask each of you individually the same question so listen to me carefully, I want to know if any of you have such strong religious, moral, or conscientious principles in opposition to the death penalty that you would be unwilling to vote to return an advisory sentence recommending the death sentence even though the facts presented to you should be such as under the law would require that recommendation. Do you understand my question?"

The court then proceeded to question the members of the venire individually, but did so while the entire venire was present in the courtroom. Thus, throughout the individual questioning, all the veniremen could hear the questions and answers. In fact, the prosecution frequently incorporated prior questioning of other veniremen by reference, each time with the assurance from the individual being questioned that he or she had heard and understood the previous questions. See Record 89–90, 112, 141–142; see also *id.*, at 150.

The court repeatedly stated the correct standard when questioning individual members of the venire.[2] Murphy was present and heard the court ask the proper *Witherspoon* question over and over again.[3] After many instances of such questioning, Murphy was seated in the jury box. The court first asked Murphy his occupation, and learned that he was retired, but had spent the eight years before retirement working in the administration office of St. Pios Seminary. The court then asked, "Do you have any moral or religious, conscientious moral or religious principles in opposition to the death penalty so strong that you would be unable without violating your own principles to vote to recommend a death penalty regardless of the facts." After Murphy responded, "Yes, I have" he was excused.

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[2] Prior to *voir dire* defense counsel objected to any questioning by the prosecution regarding a potential juror's feelings about the death penalty. The judge denied the motion, stating:

> "It is my ruling if a prospective juror states in his voir dire examination that because of his moral, religious or conscientious principles and belief he would be unwilling to recommend a death penalty, even though the facts and circumstances meet the requirements of law, then he in effect has said he would be unwilling to follow the law . . . ."

Although the judge correctly stated the general standard for dismissal, he assured defense counsel that they were free to make an objection to any particular *Witherspoon* question that was otherwise objectionable or that had "gone too far." Record 19.

[3] For example, the court asked Mrs. Macy: "[D]o you hold such conscientious moral or religious principles in opposition to the death penalty that you would be unwilling under any circumstances to recommend the death sentence?" Record 44. To Mr. Varney, who responded affirmatively to the above question, the court asked further: "[I]n the event that the evidence should be such that under the law that should be the legal recommendation you would be unwilling to return such a recommendation because of your conscientious beliefs?" *Ibid.* When three new veniremen replaced others who had been excused, the court asked "Do either of the three of you hold such strong religious, moral or conscientious principles in opposition to the imposition of the death penalty that you would be unwilling to vote to recommend the death penalty regardless of what the evidence was?" Record 88. At a similar point later on, the court explained to replacements from the venire that "I have asked the others and I will ask each of the four of you whether you have such strong religious, conscientious or moral principles against the imposition of the death penalty that you would be unwilling to vote to return a recommended sentence of the death penalty regardless of what the evidence or the facts might be?" When one of the four expressed reservations, the court once again followed up with further questioning, demonstrating its practice of assuring itself, if there was any doubt, of the potential juror's true position. *See also* Record 107. During the *voir dire* examination prior to Murphy, four potential jurors were excused on *Witherspoon* grounds.

The precise wording of the question asked of Murphy, and the answer he gave, do not by themselves compel the conclusion that he could not under any circumstance recommend the death penalty. But *Witt* recognized that "determinations of juror bias cannot be reduced to question-and-answer sessions which obtain results in the manner of a catechism." —— U. S., at ——. The trial court, "aided as it undoubtedly was by its assessment of [the potential juror's] demeanor," *id.*, at ——, was under the obligation to determine whether Murphy's views "would prevent or substantially impair the performance of his duties as a juror," *id.*, at ——. In making this determination, the trial court could take account of the fact that Murphy was present throughout an entire series of questions that made the purpose and meaning of the *Witt* inquiry absolutely clear. No specific objection was made to the excusal of Murphy by defense counsel. Nor did the court perceive, as it had previously, any need to question further. Viewing the record of *voir dire* in its entirety, we agree with the reasoning of the Court of Appeals that the trial court's decision to exclude this juror was proper. 767 F. 2d, at 754.

IV

Petitioner next contends that the prosecution's closing argument at the guilt-innocence stage of the trial rendered his conviction fundamentally unfair and deprived the sentencing determination of the reliability that the Eighth Amendment requires.

It is helpful as an initial matter to place these remarks in context. Closing argument came at the end of several days of trial. Because of a state procedural rule[4] petitioner's counsel had the opportunity to present the initial summation as well as a rebuttal to the prosecutors' closing arguments. The prosecutors' comments must be evaluated in light of the defense argument that preceded it, which blamed the Polk County Sheriff's Office for a lack of evidence,[5] alluded to the death penalty,[6] characterized the perpetrator of the crimes as an "animal,"[7] and contained counsel's personal opinion of the strength of the state's evidence.[8]

The prosecutors then made their closing argument. That argument deserves the condemnation it has received from every court to review it, although no court has held that the argument rendered the trial unfair. Several comments attempted to place some of the blame for the crime on the Division of Corrections, because Darden was on weekend furlough from a prison sentence when the crime occurred.[9] Some comments implied that the death penalty would be the only guarantee against a future similar act.[10] Others incorporated the defense's use of the word "animal."[11] Prosecutor McDaniel made several offensive comments reflecting an emotional reaction to the case.[12] These comments undoubtedly were improper. But as both the District Court and the original panel of the Court of Appeals (whose opinion on this issue still stands) recognized, it "is not enough that the prosecutors' remarks were undesirable or even universally condemned." *Darden* v. *Wainwright*, 699 F. 2d 1031, 1036 (CA11 1983). The relevant question is whether the prosecutors' comments "so infected the trial with unfairness as to make the resulting conviction a denial of due process." *Donnelly* v. *DeChristoforo*, 416 U. S. 637 (1974). Moreover, the appropriate standard of review for such a claim on writ of habeas corpus is "the narrow one of due process, and not the broad exercise of supervisory power." *Id.*, at 642.

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[4] Rule 3.250 of the Florida Rules of Criminal Procedure (1973) provided that "a defendant offering no testimony in his own behalf, except his own, shall be entitled to the concluding argument before the jury."

[5] "The Judge is going to tell you to consider the evidence or the lack of evidence. We have a lack of evidence, almost criminally negligent on the part of the Polk County Sheriff's Office in this case. You could go on and on about it." Record 728.

[6] "They took a coincidence and magnified that into a capital case. And they are asking you to kill a man on coincidence." Record 730.

[7] "The first witness you saw was Mrs. Turman, who was a pathetic figure; who worked and struggled all of her life to build what little she had, the little furniture store; and a woman who was robbed, sexually assaulted, and then had her husband slaughtered before her eyes, by what would have to be a vicious animal." Record 717. "And this murderer ran after him, aimed again, and this poor kid with half his brains blown away. . . . It's the work of an animal, there's no doubt about it." Record 731–732.

[8] "So they come up here and ask Citrus County people to kill the man. You will be instructed on lesser included offenses. . . . The question is, do they have enough evidence to kill that man, enough evidence? And I honestly do not think they do." Record 736–737.

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[9] "As far as I am concerned, there should be another Defendant in this courtroom, one more, and that is the division of corrections, the prisons. . . . Can we expect him to stay in a prison when they go there? Can we expect them to stay locked up once they go there? Do we know that they're going to be out on the public with guns, drinking?" Record 749–750. "Yes, there is another Defendant, but I regret that I know of no charges to place upon him, except the public condemnation of them, condemn them." Record 750–751.

[10] "I will ask you to advise the Court to give him death. That's the only way I know that he is not going to get out on the public. It's the only way I know. It's the only way I can be sure of it. It's the only way anybody can be sure of it now, because the people that turned him loose—" Record 753.

[11] "As far as I am concerned, and as Mr. Maloney said as he identified this man as an animal, this animal was on the public for one reason." Record 749.

[12] "He shouldn't be out of his cell unless he has a leash on him and a prison guard at the other end of that leash." Record 750. "I wish [Mr. Turman] had had a shotgun in his hand when he walked in the back door and blown his [Darden's] face off. I wish I could see him sitting here with no face, blown away by a shotgun." Record 758. "I wish someone had walked in the back door and blown his head off at that point." Record 759. "He fired in the boy's back, number five saving one. Didn't get a chance to use it. I wish he had used it on himself." Record 774. "I wish he had been killed in the accident, but he wasn't. Again, we are unlucky that time." Record 775. "Don't forget what he has done according to those witnesses, to make every attempt to change his appearance from September the 8th, 1973. The hair, the goatee, even the moustache and the weight. The only thing he hasn't done that I know of is cut his throat." Record 779. After this, the last in a series of such comments, defense counsel objected for the first time.

Under this standard of review, we agree with the reasoning of every court to consider these comments that they did not deprive petitioner of a fair trial.[13] The prosecutors' argu-

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[13] The dissenting opinion argues that because of prosecutorial misconduct petitioner did not receive a fair trial. The dissent states that the Court is "willing to tolerate not only imperfection, but a level of fairness and reliability so low it should make conscientious prosecutors cringe." *Post*, at 1. We agree that the argument was, and deserved to be, condemned. *Ante*, at 10. Conscientious prosecutors will recognize, however, that *every court* that criticized the argument went on to hold that the *fairness* of petitioner's trial was not affected by the prosecutors' argument.

On direct appeal in 1976, the Florida Supreme Court so held after a careful review of the "totality of the record." *Darden* v. *State*, 329 So. 2d 287, 290–291. On the first federal habeas petition, the District Court considered the prosecution's closing argument at length and denied the petition. It concluded after a "thorough review of the record" that it was "convinced that no relief is warranted." *Darden* v. *Wainwright*, 513 F. Supp. 947, 958 (MD Fla. 1981). "Darden's trial was not perfect—few are—but neither was it fundamentally unfair." *Ibid.* The original panel of the Court of Appeals affirmed the District Court's holding with respect to the prosecutors' argument. It stated that it had "considered the prosecutors' remarks and evaluated them in light of Darden's entire trial," and that it "agree[d] with the district court's conclusion that the prosecutors' comments did not deny Darden a fundamentally fair trial." 699 F. 2d 1031, 1036–1037. When the Court of Appeals reheard the case *en banc* for the second time it expressly agreed with the panel decision on the prosecutorial misconduct issue. 725 F. 2d 1526, 1532 (1984).

The Court of Appeals, however, reversed the District Court on the *Witherspoon* issue. This Court granted the state's petition for certiorari only on that issue, and vacated and remanded the case for reconsideration in light of *Wainwright* v. *Witt*, 469 U. S. —— (1985). The Court of Apment did not manipulate or misstate the evidence, nor did it implicate other specific rights of the accused such as the right to counsel or the right to remain silent. See *Darden* v. *Wainwright*, 513 F. Supp., at 958. Much of the objectionable content was invited by or was responsive to the opening summation of the defense. As we explained in *United States* v. *Young*, 470 U. S. —— (1985), the idea of "invited response" is used not to excuse improper comments, but to determine their effect on the trial as a whole. *Id.*, at —— The trial court instructed the jurors several times that their decision was to be made on the basis of the evidence alone, and that the arguments of counsel were not evidence. The weight of the evidence against petitioner was heavy; the "overwhelming eyewitness and circumstantial evidence to support a finding of guilt on all charges," 329 So. 2d, at 291, reduced the likelihood that the jury's decision was influenced by argument. Finally, defense counsel made the tactical decision not to present any witness other than petitioner. This decision not only permitted them to give their summation prior to the prosecution's closing argument, but also gave them the opportunity to make a final rebuttal argument. Defense counsel were able to use the opportunity for rebuttal very effectively, turning much of the prosecutors' closing argument against them by placing many of the prosecutors' comments and actions in a light that was more likely to engender strong disapproval than result in inflamed passions against petitioner.[14] For these reasons, we agree with the

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peals denied all relief, 767 F. 2d 752 (1985). During this protracted litigation not one court has agreed with petitioner's claim with respect to improper prosecutorial argument.

[14] "Mr. McDaniel made an impassioned plea . . . how many times did he repeat [it]? I wish you had been shot, I wish they had blown his face away. My God, I get the impression he would like to be the man that stands there and pulls the switch on him." Record 791; see also *id.*, at 794.

One of Darden's counsel testified at the habeas corpus hearing that he made the tactical decision not to object to the improper comments. Based on his long experience with prosecutor McDaniel, he knew McDaniel would

District Court below that "Darden's trial was not perfect—few are—but neither was it fundamentally unfair." 513 F. Supp., at 958.[15]

"get much more vehement in his remarks if you allowed him to go on." By not immediately objecting, he hoped to encourage the prosecution to commit reversible error. Supp. App. 46–47.

[15] The dissenting opinion mistakenly argues that the Court today finds, in essence, that any error was harmless, and then criticizes the Court for not applying the harmless error standard. *Post*, at 7–8. We do not decide the claim of prosecutorial misconduct on the ground that it was harmless error. In our view of the case, that issue is not presented. Rather, we agree with the holding of every court that has addressed the issue, that the prosecutorial argument, in the context of the facts and circumstances of this case, did not render respondent's trial unfair—*i. e.*, that it was not constitutional error.

Petitioner also maintains that the comments violated the requirement of reliability in the sentencing process articulated in *Caldwell* v. *Mississippi*, 472 U. S. —— (1985). The principles of *Caldwell* are not applicable to this case. *Caldwell* involved comments by a prosecutor during the sentencing phase of trial to the effect that the jury's decision as to life or death was not final, that it would automatically be reviewed by the state supreme court, and that the jury should not be made to feel that the entire burden of the defendant's life was on them. This Court held that such comments "present[] an intolerable danger that the jury will in fact choose to minimize the importance of its role," a view that would be fundamentally incompatible with the Eighth Amendment requirement that the jury make an individualized decision that death is the appropriate punishment in a specific case. *Id.*, at ——.

There are several factual reasons for distinguishing *Caldwell* from the present case. The comments in *Caldwell* were made at the sentencing phase of trial and were approved by the trial judge. In this case, the comments were made at the guilt-innocence stage of trial, greatly reducing the chance that they had any effect at all on sentencing. The trial judge did not approve of the comments, and several times instructed the jurors that the arguments were not evidence and that their decision was to be based only on the evidence. But petitioner's reliance on *Caldwell* is even more fundamentally mistaken than these factual differences indicate. *Caldwell* is relevant only to certain types of comment—those that mislead the jury as to its role in the sentencing process in a way that allows the jury to feel less responsible than it should for the sentencing decision. In this case, none of the comments could have had the effect of misleading the jury into

V

Petitioner contends that he was denied effective assistance of counsel at the sentencing phase of trial. That claim must be evaluated against the two-part test announced in *Strickland* v. *Washington*, 466 U. S. —— (1984). First, petitioner must show that "counsel's representation fell below an objective standard of reasonableness." *Id.*, at ——. Second, petitioner must show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.*, at ——. Petitioner argues that his trial counsel did not delve sufficiently into his background, and as a result were unprepared to present mitigating evidence at the sentencing hearing.

As an initial matter, petitioner contends that trial counsel devoted only the time between the close of the guilt phase of trial and the start of the penalty phase—approximately one-half hour—to preparing the case in mitigation. That argument is without merit. Defense counsel engaged in extensive preparation prior to trial, in a manner that included preparation for sentencing. Mr. Jack Johnson, head of the Public Defender's office at the time, stated to the habeas court that "I would say we have expended more man hours on this case than on any case to my knowledge." Record 320. Mr. Goodwill, an experienced criminal trial lawyer, testified that he "spent more time on this case than I spent on . . . any capital case I have been involved in, probably more time than any case I've ever been involved in." Supp. App. 30. That included time investigating petitioner's alibi, and driving petitioner around the scene of events to establish each point of his story. Counsel obtained a psychiatric report on petitioner, with an eye toward using it in mitigation during sen-

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thinking that it had a reduced role in the sentencing process. If anything, the prosecutors' comments would have had the tendency to *increase* the jury's perception of its role. We therefore find petitioner's Eighth Amendment argument unconvincing.

tencing. Counsel also learned in pre-trial preparation that Mrs. Turman was opposed to the death penalty, and considered the possibility of putting her on the stand at the sentencing phase. The record clearly indicates that a great deal of time and effort went into the defense of this case; a significant portion of that time was devoted to preparation for sentencing.

Petitioner also claims that his trial counsel interpreted Fla. Stat. § 921.141(7), a statutory list of mitigating factors, as an exclusive list. He contends that their failure to introduce any evidence in mitigation was the result of this interpretation of the statute, and that he was thereby deprived of effective assistance of counsel. We express no view about the reasonableness of that interpretation of Florida law, because in this case, the trial court specifically informed petitioner and his counsel just prior to the sentencing phase of trial that they could "go into any other factors that might really be pertinent to full consideration of your case and the analysis of you and your family situation, your causes, or anything else that might be pertinent to what is the appropriate sentence." Record 887. At that point, even if counsel previously believed the list to be exclusive, they knew they were free to offer nonstatutory mitigating evidence, and chose not to do so.

As we recognized in *Strickland*, "[j]udicial scrutiny of counsel's performance must be highly deferential. . . . A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's perspective at the time." 466 U. S., at 689. In particular, "a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" *Ibid.*, quoting *Michel* v. *Louisiana*, 350 U. S. 91, 100–101 (1955). In this case, there are several reasons why counsel reasonably could have chosen to rely on a simple plea for mercy from petitioner himself. Any attempt to portray petitioner as a non-violent man would have opened the door for the State to rebut with evidence of petitioner's prior convictions. This evidence had not previously been admitted in evidence, and trial counsel reasonably could have viewed it as particularly damaging. The head of the Public Defenders Office testified at the habeas corpus hearing that petitioner "had been in and out of jails and prisons for most of his adult life . . . ." Record of Habeas Corpus 209. Petitioner had, for example, previously been convicted of assault with intent to commit rape. *Darden* v. *State*, 218 So. 2d 485 (Fla. App. 1969). In addition, if defense counsel had attempted to offer testimony that petitioner was incapable of committing the crimes at issue here, the state could have responded with a psychiatric report that indicated that petitioner "very well could have committed the crime; that he was, as I recall his [the psychiatrist's] term, sociopathic type personality; that he would act entirely on impulse with no premeditation from the standpoint of planning. But that when a situation arose, the decision would be made simultaneously to commit the act." Supp. App. 76 (testimony of Mr. Goodwill). For that reason, after consultation with petitioner, defense counsel rejected use of the psychiatric testimony. Record at 886. Similarly, if defense counsel had attempted to put on evidence that petitioner was a family man, they would have been faced with his admission at trial that, although still married, he was spending the weekend furlough with a girlfriend. In sum, petitioner has not "overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" 466 U. S., at 689, quoting *Michel* v. *Louisiana*, 350 U. S. 91, 101 (1955). Petitioner has failed to satisfy the first part of the *Strickland* test, that his trial counsels' performance fell below an objective standard of reasonableness. We agree with both the District Court and the Court of Appeals that petitioner was not deprived of the effective assistance of counsel. 699 F. 2d, at 1037.

VI

The decision of the Court of Appeals is affirmed, and the case is remanded for proceedings consistent with this opinion.

It is so ordered.

SUPREME COURT OF THE UNITED STATES

No. 85-5319

WILLIE JASPER DARDEN, PETITIONER *v.* LOUIE L. WAINWRIGHT, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

[June 23, 1986]

CHIEF JUSTICE BURGER, concurring.

I concur fully in the opinion for the Court and write separately only to address the dissent's suggestion that the Court rejects Darden's *Witherspoon* claim because of its "impatience with the progress of Darden's constitutional challenges to his conviction." *Ante*, at ——. In support of this contention, reference is made to my dissent from the grant of certiorari in this case. The dissent states that I voted to deny the petition because Darden's claims have been reviewed by 95 judges in the 12 years since his conviction. This is simply incorrect. To set the record straight, I quote my dissent in full:

> "In the 12 years since petitioner was convicted of murder and sentenced to death, the issues now raised in the petition for certiorari have been considered by this Court four times, see *Darden* v. *Florida*, 430 U. S. 704 (1977) (certiorari dismissed as improvidently granted); *Darden* v. *Wainwright*, —— U. S. —— (1984) (certiorari denied); *Wainwright* v. *Darden*, —— U. S. —— (1985) (vacating and remanding); *Darden* v. *Wainwright*, —— U. S. —— (1985) (order dated September 3, 1985 denying application for stay), and have been litigated before no fewer than 95 federal and state court judges. Upon review of the petition and the history of this case, I

> conclude that no issues are presented that merit plenary review by this Court. Because we abuse our discretion when we accept meritless petitions presenting claims that we rejected only hours ago, I dissent." —— U. S. —— (1985).

As my dissent makes clear, I voted to deny the petition in this extraordinary case because the meritless claims raised did not require plenary review. Full briefing and oral argument have not changed my views.

The dissent's suggestion that this Court is motivated by impatience with Darden's constitutional claims is refuted by the record; the thirteen years of judicial proceedings in this case manifest substantial care and patience. Our rejection of Darden's claims in this the fourth time he has sought review in this Court is once again based on a thoughtful application of the law to the facts of the case. At some point there must be finality.

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[June 23, 1986]

JUSTICE BRENNAN, dissenting.

I join my Brother BLACKMUN's dissent. Moreover, adhering to my view that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227 (1976) (BRENNAN, J., dissenting), I would vacate the death sentence imposed in this case.

SUPREME COURT OF THE UNITED STATES

No. 85-5319

WILLIE JASPER DARDEN, PETITIONER *v.* LOUIE L. WAINWRIGHT, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

[June 23, 1986]

JUSTICE BLACKMUN, with whom JUSTICE BRENNAN, JUSTICE MARSHALL, and JUSTICE STEVENS join, dissenting.

Although the Constitution guarantees a criminal defendant only "a fair trial [and] not a perfect one," *Lutwak* v. *United States*, 344 U. S. 604, 619 (1953); *Bruton* v. *United States*, 391 U. S. 123, 135 (1968), this Court has stressed repeatedly in the decade since *Gregg* v. *Georgia*, 428 U. S. 153 (1976), that the Eighth Amendment requires a heightened degree of reliability in any case where a State seeks to take the defendant's life.[1] Today's opinion, however, reveals a Court willing to tolerate not only imperfection but a level of fairness and reliability so low it should make conscientious prosecutors cringe.

I

A

The Court's discussion of Darden's claim of prosecutorial misconduct is noteworthy for its omissions. Despite the fact that earlier this Term the Court relied heavily on standards governing the professional responsibility of defense counsel in ruling that an attorney's actions did not deprive his client of any constitutional right, see *Nix* v. *Whiteside*, —— U. S. ——, —— (1986) (slip op. 8–13), today it entirely ignores standards governing the professional responsibility of prosecutors in reaching the conclusion that the summations of Darden's prosecutors did not deprive him of a fair trial. See *ante*, at 9–14.

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[1] See, *e. g.*, *Caldwell* v. *Mississippi*, 472 U. S. ——, —— (1985) (slip op. 7); *California* v. *Ramos*, 463 U. S. 992, 998–999 (1983); *Beck* v. *Alabama*, 447 U. S. 625, 637–638 (1980); *Lockett* v. *Ohio*, 438 U. S. 586, 604 (1978) (plurality opinion); *Gardner* v. *Florida*, 430 U. S. 349, 358–359 (1977) (plurality opinion); *Woodson* v. *North Carolina*, 428 U. S. 280, 305 (1976) (plurality opinion).

The prosecutors' remarks in this case reflect behavior as to which "virtually all the sources speak with one voice," *Nix* v. *Whiteside*, *supra*, at —— (slip op. 8), that is, a voice of strong condemnation.[2] The following brief comparison of

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[2] Every judge who has addressed the prosecutors' behavior has condemned it. See *Darden* v. *State*, 329 So. 2d 287, 290 (Fla. 1976) ("the prosecutor's remarks under ordinary circumstances would constitute a violation of the Code of Professional Responsibility"); *id.*, at 291–295 (dissenting opinion); *Darden* v. *Wainwright*, 513 F. Supp. 947, 955 (MD Fla. 1981) ("Anyone attempting a text-book illustration of a violation of the Code of Professional Responsibility . . . could not possibly improve upon [prosecutor White's final statement]"); *Darden* v. *Wainwright*, 699 F. 2d 1031, 1035–1036 (CA11 1983); *id.*, at 1040–1043 (dissenting opinion). Even the State's Attorney concedes that prosecutor McDaniel's summation was an "unnecessary tirade," Supp. App. 46, that "[n]o one has ever even weakly suggested that McDaniel's closing remarks were anything but improper," Supplemental Answer 12, *Darden* v. *Wainwright*, Case No. 79–566-Civ. T. H. (MD Fla.) (June 1, 1979), and that much of the summation consisted of "inflammatory irrelevancies," Answer to Petition for Writ of Habeas Corpus 11, *Darden* v. *Wainwright*, Case. No. 79–566-Civ. T. H. (MD Fla.) (May 22, 1979).

It is true that the Florida Supreme Court, the Federal District Court, and the Court of Appeals each ultimately concluded that Darden had not been deprived of a fair trial. But the grounds on which each rested its conclusion are troubling indeed. The Florida Supreme Court's "careful review of the 'totality of the record,'" as this Court now would describe it, *ante*, at 12, n. 13, consists of three paragraphs. The first of these discusses evidence that petitioner "was a career criminal," who stayed with a woman other than his wife while on furlough, and used her car to visit various bars and a pool hall contrary to the conditions of his furlough. The established standards of prosecutorial conduct with the prosecutors' behavior in this case merely illustrates, but hardly exhausts, the scope of the misconduct involved:

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second paragraph notes, among other things, that petitioner "admitted speeding in a rainstorm and creating great danger to other motorists" on the night of the murder. And the last describes the heinousness of the events that occurred at the Turmans' store, but says absolutely nothing about the evidence tying petitioner to those events. 329 So. 2d, at 290. (The court earlier had noted that that Mrs. Turman and Phillip Arnold had identified petitioner as the perpetrator. *Id.*, at 288.)

The crux of the Florida Supreme Court's analysis, however, is that it was not "possible to use language which is fair comment about these crimes without shocking the feelings of any normal person[.] The language used by the prosecutor would have possibly been reversible error if it had been used regarding a less heinous set of crimes. The law permits fair comment. This comment was fair." *Id.*, at 290. Since the prosecutors had "reasonably describ[ed] what happened and what should be done to the guilty party," their comments were not erroneous. *Id.*, at 291.

The standard apparently applied by Florida is wholly unacceptable. A defendant's right to a fair trial cannot depend on the nature of the crime of which he is accused. And "what should be done to the guilty party" cannot be relevant to the determination of guilt.

The District Court's conclusion suffers from a similar error. In addition to advancing many of the arguments adopted by the Court today—none of which is persuasive, see *infra*—the District Court found no prejudice because the offensive statements were not "keyed to arouse prejudice against the accused on any basis other than the horror of the crimes themselves." 513 F. Supp., at 956, n. 12. But at the guilt phase of this bifurcated trial, horror about the crimes was irrelevant. The sole issue was whether Darden committed them. The Court of Appeals merely quoted and approved the analysis of the District Court. See 699 F. 2d, at 1036–1037.

In its catalogue of the number of judges who have found petitioner's trial to have been fair, the Court fails to include the Magistrate before whom petitioner's federal habeas proceedings were actually conducted, and who recommended that the District Court grant petitioner habeas relief on the basis of his claim of prosecutorial misconduct. Magistrate Paul Game, Jr., correctly recognized that this case essentially turned on the relative credibility of three witnesses, Mrs. Turman, Phillip Arnold, and Willie Darden, and that the prosecutors' concerted attack on Darden's humanity could well have affected the jury's assessment of his credibility. See App. 214. He also recognized that the remarks occurred "[i]n the context of the emotion-

1. "A lawyer shall not . . . state a personal opinion as to . . . the credibility [of] a witness . . . or the guilt or innocence of an accused." Model Rules of Professional Conduct, Rule 3.4(e); see also Code of Professional Responsibility, DR 7–106(C)(4); ABA Standards for Criminal Justice: The Prosecution Function, Standard 3–5.8(b) (1982). Yet one prosecutor, White, stated: "I am convinced, as convinced as I know I am standing before you today, that Willie Jasper Darden is a murderer, that he murdered Mr. Turman, that he robbed Mrs. Turman and that he shot to kill Phillip Arnold. I will be convinced of that the rest of my life." App. 15. And the other prosecutor, McDaniel, stated, with respect to Darden's testimony: "Well, let me tell you something: If I am ever over in that chair over there, facing life or death, life imprisonment or death, I guarantee you I will lie until my teeth fall out." *Id.*, at 18.

2. "The prosecutor should refrain from argument which would divert the jury from its duty to decide the case on the evidence, by injecting issues broader than the guilt or innocence of the accused under the controlling law, or by making predictions of the consequences of the jury's verdict." ABA Standards for Criminal Justice: The Prosecution Function, Standard 3–5.8(d); cf. Model Rules of Professional Conduct, Rule 3.4(e); Code of Professional Responsibility, DR 7–106(C)(7); ABA Standards for Criminal Justice: The Prosecution Function, Standard 3–6.1(c). Yet McDaniel's argument was filled with references to Darden's status as a prisoner on furlough who "shouldn't be out of his cell unless he has a leash on him." App. 16; see also, *e. g.*, *id.*, at 17, 18,

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ally charged trial of Darden, a black man, accused of robbery, the brutal murder of a white man, the repeated shooting of a defenseless white teenager and vile sexual advances on a white woman." *Id.*, at 215. Notably, the Court today ignores the context in which the trial took place, including the fact that petitioner's motion for a change of venue was granted, and contents itself instead with hypothesizing reasons why the prosecutors' shameful conduct should not deprive them of a hanging verdict.

23, 24, 26. Again and again, he sought to put on trial an absent "defendant," the State Department of Corrections that had furloughed Darden. See, *e. g.*, *id.*, at 15, 17, 23, 32. He also implied that defense counsel would use improper tricks to deflect the jury from the real issue. See *id.*, at 15, 26. Darden's status as a furloughed prisoner, the release policies of the Department of Corrections, and his counsel's anticipated tactics obviously had no legal relevance to the question the jury was being asked to decide: whether he had committed the robbery and murder at the Turmans' furniture store. Indeed, the State argued before this Court that McDaniel's remarks were harmless precisely *because* he "failed to discuss the issues, the weight of the evidence, or the credibility of the witnesses." Brief for Respondent 26.

3. "The prosecutor should not use arguments calculated to inflame the passions or prejudices of the jury." ABA Standards for Criminal Justice: The Prosecution Function, Standard 3–5.8(c); see *Berger* v. *United States*, 295 U. S. 78, 88 (1935). Yet McDaniel repeatedly expressed a wish "that I could see [Darden] sitting here with no face, blown away by a shotgun," App. 20; see also, *e. g.*, *id.*, at 28, 29, 31. Indeed, I do not think McDaniel's summation, taken as a whole, can accurately be described as anything but a relentless and single-minded attempt to inflame the jury.

B

The Court, see *ante*, at 12, relies on the standard established in *Donnelly* v. *DeChristoforo*, 416 U. S. 637, 643 (1974), for deciding when a prosecutor's comments at a state trial render that trial fundamentally unfair. It omits, however, any discussion of the facts, so different from those in this case, that led the Court to conclude in *DeChristoforo* that that defendant had not been deprived of a fair trial.

DeChristoforo concerned "two remarks made by the prosecutor during the course of his rather lengthy closing argument to the jury." *Id.*, at 640. One remark was "but one moment of an extended trial." *Id.*, at 645. And even the more objectionable remark was so "ambiguous," *ibid.*, that it provided no basis for inferring either that the prosecutor "intend[ed] [it] . . . to have its most damaging meaning or that a jury, sitting through lengthy exhortation, [would] draw that meaning from the plethora of less damaging interpretations," *id.*, at 647. Finally, the trial judge in *DeChristoforo* expressly instructed the jury to disregard the improper statements. *Id.*, at 645. This Court's holding thus rested on its conclusion that the prosecutor's comments were neither so extensive nor so improper as to violate the Constitution.

Far from involving "ambiguous" statements that "might or might not" affect the jury, *id.*, at 647, the remarks at issue here were "focused, unambiguous, and strong." *Caldwell* v. *Mississippi*, 472 U. S. ——, —— (1985) (slip op. 18). It is impossible to read the transcript of McDaniel's summation without seeing it as a calculated and sustained attempt to inflame the jury. Almost every page contains at least one offensive or improper statement; some pages contain little else. The misconduct here was not "slight or confined to a single instance, but . . . was pronounced and persistent, with a probable cumulative effect upon the jury which cannot be disregarded as inconsequential." *Berger* v. *United States*, 295 U. S., at 89.

C

The Court presents what is, for me, an entirely unpersuasive one-page laundry list of reasons for ignoring this blatant misconduct. First, the Court says that the summations "did not manipulate or misstate the evidence [or] . . . implicate other specific rights of the accused such as the right to counsel or the right to remain silent." *Ante*, at 13. With all respect, that observation is quite beside the point. The "solemn purpose of endeavoring to ascertain the truth . . . is the *sine qua non* of a fair trial," *Estes* v. *Texas*, 381 U. S. 532, 540 (1965), and the summations cut to the very heart of the

Due Process Clause by diverting the jury's attention "from the ultimate question of guilt or innocence that should be the central concern in a criminal proceeding." *Stone* v. *Powell*, 428 U. S. 465, 490 (1976).

Second, the Court says that "[m]uch of the objectionable content was invited by or was responsive to the opening summation of the defense." *Ante*, at 13, citing *United States* v. *Young*, 470 U. S. —— (1985). The Court identifies four portions of the defense summation that it thinks somehow "invited" McDaniel's sustained barrage. The State, however, did not object to any of these statements, and, to my mind, none of them is so objectionable that it would have justified a tactical decision to interrupt the defense summation and perhaps irritate the jury. Cf. *id.*, at —— (slip op. 12).

The Court begins by stating that defense counsel "blamed" the sheriff's office for a lack of evidence. *Ante*, at 10. The Court does not identify which, if any, of McDaniel's remarks represented a response to this statement. I cannot believe that the Court is suggesting, for example, that defense counsel's one mention of the "almost crimina[l] negligen[ce] on the part of the Polk County Sheriff's Office," Tr. 728, justified McDaniel's express and repeated wish that he could try the Department of Corrections for murder. See, *e. g.*, App. 15, 17, 23, 32.

Next, the Court notes that defense counsel "alluded" to the death penalty. *Ante*, at 10. While this allusion might have justified McDaniel's statement that "you are merely to determine his innocence or guilt, nothing else," App. 17, it could hardly justify, for example, McDaniel's expressions of his personal wish that Darden be "blown away by a shotgun," *id.*, at 20; see also *id.*, at 28, 29, 31.

Moreover, the Court says, defense counsel twice referred to the perpetrator as an "animal." *Ante*, at 10; see Tr. 717, 732. It is entirely unclear to me why this characterization called for any response from the prosecutor at all. Taken in context, defense counsel's statements did nothing more than tell the jury that, although everyone agreed that a heinous crime had been committed, the issue on which it should focus was whether *Darden* had committed it.

Finally, the Court finds that Darden brought upon himself McDaniel's tirade because defense counsel gave his "personal opinion of the strength of the State's evidence." *Ante*, at 10. Again, the Court gives no explanation of how the statement it quotes—a single, mild expression of defense counsel's overall assessment of the evidence—justified the "response" that followed, which consisted, to the extent it represented a comment on the evidence at all, of accusations of perjury, see App. 18–19, and personal disparagements of opposing counsel, see *id.*, at 15, 26. In sum, McDaniel went so far beyond "respond[ing] substantially in order to 'right the scale,'" *Young*, 470 U. S., at —— (slip op. 11), that the reasoning in *Young* provides no basis at all for the Court's holding today.

The third reason the Court gives for discounting the effects of the improper summations is the supposed curative effect of the trial judge's instructions: the judge had instructed the jury that it was to decide the case on the evidence and that the arguments of counsel were not evidence. *Ante*, at 13. But the trial court overruled Darden's objection to McDaniel's repeated expressions of his wish that Darden had been killed, App. 31, thus perhaps leaving the jury with the impression that McDaniel's comments were somehow relevant to the question before them. The trial judge's instruction that the attorneys were "trained in the law," and thus that their "analysis of the issues" could be "extremely helpful," Tr. 714, might also have suggested to the jury that the substance of McDaniel's tirade was pertinent to their deliberations.

Fourth, the Court suggests that because Darden enjoyed the tactical advantage of having the last summation, he was able to "tur[n] much of the prosecutors' closing argument against them." *Ante*, at 13. But the issue before the jury was whether Darden was guilty, not whether McDaniel's summation was proper. And the question before this Court is not whether we agree with defense counsel's criticism of the summation but whether the jury was affected by it. Since Darden was ultimately convicted, it is hard to see what basis the Court has for its naked assertion that "[d]efense counsel were able to use the opportunity for rebuttal very effectively." *Ante*, at 13; cf. *Young*, 470 U. S., at ——, n. 15 (slip op. 17, n. 15) (the defendant's acquittal of the most serious charge "reinforces our conclusion that the prosecutor's remarks did not undermine the jury's ability to view the evidence independently and fairly").

Fifth, the Court finds, in essence, that any error was harmless: "The weight of the evidence against petitioner was heavy; the 'overwhelming eyewitness and circumstantial evidence to support a finding of guilt on all charges,' 329 So. 2d, at 291, reduced the likelihood that the jury's decision was influenced by argument." *Ante*, at 13. The Court rejects the "no effect" test set out in *Caldwell* v. *Mississippi*, *supra*, see *ante*, at 14, n. 14, but it does not identify the standard it does use to decide the harmlessness of the error.[3]

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[3] The Court finds *Caldwell* inapposite because the offending comment in *Caldwell* occurred at the sentencing stage of the defendant's trial and misled the jury as to its role in the sentencing process. *Ante*, at 13, n. 14. But *Caldwell*'s Eighth Amendment underpinnings clearly extend to guilt determinations in capital cases as well as to sentencing. *Beck* v. *Alabama*, 447 U. S. 625, 637–638 (1980). And under the circumstances of this case, where the sentencing hearing followed immediately upon the jury's return of a guilty verdict and the State's summation consisted of less than a full page of transcript, see Tr. 894, I think the State must have assumed that its attacks on the Department of Corrections and repeatedly expressed wish that Darden die would affect the jury's sentencing decision as well as its determination of guilt. Indeed, the District Court found that the summations during the guilt phase were "in effect [the State's] principal argument in support of the death penalty." 513 F. Supp., at 953 and n. 10. Moreover, I do not see why misleading a jury as to the relevant issues in a capital trial is somehow less pernicious than misleading a jury as to its role.

Every harmless-error standard that this Court has employed, however, shares two salient features. First, once serious error has been identified, the burden shifts to the beneficiary of the error to show that the conviction was not tainted. Second, although different formulations of the harmless-error standard differ in the level of confidence in the outcome required to overcome that burden, the question before a reviewing court is never whether the evidence would have been sufficient to justify conviction, absent an error, but, rather, whether the error undermines its confidence in the outcome of the proceeding to an unacceptable degree. See, *e. g., United States* v. *Young*, 470 U. S., at —— (slip op. 19); *Chapman* v. *California*, 386 U. S. 18, 24 (1967); *Kotteakos* v. *United States*, 328 U. S. 750, 765 (1946).

Regardless of which test is used, I simply do not believe the evidence in this case was so overwhelming that this Court can conclude, on the basis of the written record before it, that the jury's verdict was not the product of the prosecutors' misconduct. The three most damaging pieces of evidence—the identifications of Darden by Phillip Arnold and Helen Turman and the ballistics evidence—are all sufficiently problematic that they leave me unconvinced that a jury not exposed to McDaniel's egregious summation would necessarily have convicted Darden.

Arnold first identified Darden in a photo array shown to him in the hospital. The trial court suppressed that out-of-court identification following a long argument concerning the reliability and constitutionality of the procedures by which it was obtained. See Tr. 487–488.[4]

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[4] Of the six photographs in the array, Arnold immediately rejected four because "they just didn't fit the description" he had earlier given the police. Tr. 457. Darden's photograph was one of no more than two that identified the subject by name, and under the name on Darden's photograph was the notation "Sheriff's Department, Bartow, Florida" and the date "9/9/73." *Id.*, at 476–477. Arnold was aware at the time of the identification on September 11 that a suspect recently had been arrested. *Id.*, at 459.

Mrs. Turman's initial identification was made under even more suggestive circumstances. She testified at trial that she was taken to a preliminary hearing at which Darden appeared in order "[t]o identify him." *Id.*, at 215. Instead of being asked to view Darden in a lineup, Mrs. Turman was brought into the courtroom, where Darden apparently was the only black man present. See *id.*, at 220–221. Over defense counsel's objection, after the prosecutor asked her whether "this man sitting here" was "the man that shot your husband," *ibid.*, she identified Darden.[5] Cf. *Moore* v. *Illinois*, 434 U. S. 220, 229–230 (1977).

The use of showups has long been condemned by this Court, precisely because they can result in unreliable identifications. See, *e. g.*, *Stovall* v. *Denno*, 388 U. S. 293, 302

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[5] Mrs. Turman's identification took place after the following colloquy between the court, the prosecutor (Mr. Mars), and the defense attorney (Mr. Hill):

THE COURT: Ask her to identify.
MR. MARS: Yes, sir.
Q: Can you see this man sitting here?
MR. HILL: Your Honor, I am going to object to that type of identification.
THE COURT: I am not. Sit down.
MR. HILL: Judge—
THE COURT: Not under these circumstances, Mr. Hill.
MR. HILL: Judge, even as a defense attorney, that shows no respect in court, much less for the Court, and I—
THE COURT: I appreciate—
MR. HILL: And the objection, I want on the record.
THE COURT: I appreciate that. It's on the record. This woman has had a traumatic experience and she—
MR. HILL: Judge, I appreciate that. I still have an obligation to my client.
THE COURT: I appreciate that. Now if you want to be held in contempt, you pardon me. Alright, go ahead.
Q: Is this the man that shot your husband?
A: Yes, sir.

See Petition for Writ of Habeas Corpus By a Person in State Custody 18–19, *Darden* v. *Wainwright*, Case No. 79–566-Civ. T. H. (MD Fla.) (May 21, 1979); Tr. 218–219.

(1967). Similarly, the Court has condemned the use of photo arrays in which the suspect's photograph "is in some way emphasized." *Simmons* v. *United States*, 390 U. S. 377, 383 (1968). While the question whether the various in- and out-of-court identifications ought to have been suppressed is not now before the Court,[6] my confidence in their reliability is nonetheless undermined by the suggestiveness of the procedures by which they were obtained, particularly in light of Mrs. Turman's earlier difficulties in describing the criminal.

Finally, the ballistics evidence is hardly overwhelming. The purported murder weapon was tied conclusively neither to the crime nor to Darden. Special Agent Cunningham of the FBI's Firearms Identification Unit testified that the bullets recovered at the scene of the crime "could have been fired" from the gun, but he was unwilling to say that they in fact had come from that weapon. Tr. 347, 357. He also testified, contrary to the Court's assertion, that rebored Smith & Wessons were fairly common. See *id.*, at 350–351, 357–358. Deputy Sheriff Weatherford testified that the gun was discovered in a roadside ditch adjacent to where Darden had wrecked his car on the evening of the crime. But the gun was discovered the next day, *id.*, at 503, and the ditch was also next to a bar's parking lot. *Id.*, at 531.

Darden testified at trial on his own behalf and denied any involvement in the robbery and murder. See *id.*, at 571–660. His account of his actions on the day of the crime was contradicted only by Mrs. Turman's and Arnold's identifications. Indeed, a number of the State's witnesses corroborated parts of Darden's account. The trial judge who had seen and heard Darden testify found that he "emotionally and with what appeared on its face to be sincerity, proclaimed his innocence." App. 34. In setting sentence, he viewed the fact that Darden "repeatedly professed his complete innocence of the charges" as a mitigating factor. *Id.*, at 35.

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[6] Challenges to the admissibility of the various identifications were presented in Darden's petition to this Court for direct review of his conviction and sentence. See Brief for Petitioner 2–3, No. 76–5382, *Darden* v. *Florida* (second and third questions presented raising issues concerning the witnesses' identifications). Although that petition for certiorari was granted, 429 U. S. 917 (1976), the Court later limited its grant to the issue of the prosecutor's closing argument, 429 U. S. 1036 (1977), and ultimately dismissed the writ as improvidently granted, 430 U. S. 704 (1977).

Thus, at bottom, this case rests on the jury's determination of the credibility of three witnesses—Helen Turman and Phillip Arnold, on the one side, and Willie Darden, on the other. I cannot conclude that McDaniel's sustained assault on Darden's very humanity did not affect the jury's ability to judge the credibility question on the real evidence before it. Because I believe that he did not have a trial that was fair, I would reverse Darden's conviction; I would not allow him to go to his death until he has been convicted at a fair trial.

II

Even if Darden had been convicted fairly, however, I believe his death sentence should be vacated because of the improper exclusion for cause of a member of the venire who was qualified to serve under this Court's decisions in *Witherspoon* v. *Illinois*, 391 U. S. 510 (1968), and *Wainwright* v. *Witt*, 469 U. S. —— (1985). In *Davis* v. *Georgia*, 429 U. S. 122 (1976), the Court held that the improper exclusion of one juror renders a death sentence constitutionally infirm *per se*. In Darden's case, the potential prejudice is palpable. Even though it was stripped of members expressing reservations about the death penalty, this jury could not agree unanimously that a death sentence was appropriate. See Tr. 908; 699 F. 2d, at 1041 (dissenting opinion).

Witherspoon concerned an Illinois statute that excused for cause "any juror who shall, on being examined, state that he has conscientious scruples against capital punishment, or that he is opposed to the same." 391 U. S., at 512, quoting Ill. Rev. Stat., ch. 38, § 743 (1959). The Court held that the Constitution barred the execution of a defendant sentenced to death by a jury from which such persons had been ex-

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cluded for cause. That holding rested in large part on the Court's recognition that even some jurors who oppose the death penalty can set aside their personal beliefs and follow the court's instructions to consider whether death is an appropriate penalty. See 391 U. S., at 514–515, n.7; 515–516, n. 9; 519; 520. As recently as last Term, we held once again that trial courts must distinguish between "prospective jurors whose opposition to capital punishment will not allow them to apply the law or view the facts impartially and jurors who, though opposed to capital punishment, will nevertheless conscientiously apply the law to the facts adduced at trial." *Witt*, 469 U. S., at —— (slip op. 8); see also *id.*, at ——, n. 4 (slip op. 9–10, n.4); *Adams* v. *Texas*, 448 U. S. 38, 44–45 (1980); *Boulden* v. *Holman*, 394 U. S. 478, 483–484 (1969).

The Court's discussion of Darden's claim rests on a premise that the claim depends entirely on the wording of a single question asked by the trial judge prior to the exclusion of venire member Murphy. See *ante*, at 7. That premise is mistaken. The trial court's error lay in its misunderstanding of the proper standard for exclusion under *Witherspoon*. This misunderstanding influenced both the question the court asked Murphy and its evaluation of his answer. On this record, I cannot say with any assurance that Murphy was properly excluded.

Prior to the *voir dire* of individual venire members, the trial judge announced his intention to excuse, not only any potential juror whose religious or moral principles made him unable to impose the death penalty, but also any potential juror who, if he did follow the court's instructions, "would be going against his principles" (emphasis deleted). App. 6.[7]

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[7] In denying Darden's pretrial motion to limit *voir dire* concerning jurors' attitudes towards the death penalty, the trial court stated:

"It is my ruling if a prospective juror states on his voir dire examination that because of his moral, religious or conscientious principles and belief he would be unwilling to recommend a death penalty, even though the facts and circumstances meet the requirements of law, then he in effect has said

This standard is essentially indistinguishable from the standard employed by Illinois and expressly disapproved by this Court in *Witherspoon*. If a juror who has reservations about the wisdom or morality of the death penalty nonetheless follows the court's instructions, he has *not* been "'prevent[ed] or substantially impair[ed in] thc performance of his duties as a juror in accordance with his instructions and his oath,'" *Witt*, 469 U. S., at —— (slip op. 11), quoting *Adams*, 448 U. S., at 45. To permit only those individuals who have no reservations about exercising "the truly awesome responsibility of decreeing death for a fellow human," *McGautha* v. *California*, 402 U. S. 183, 208 (1971), to serve on capital juries would surely mark a return to the empanelling of juries "uncommonly willing to condemn a man to die," *Witherspoon*, 391 U. S., at 521.

This case is thus entirely unlike *Witt*. *Witt*'s statement that determinations of juror bias cannot be reduced to a catechism, 469 U. S., at —— (slip op. 12), and its reliance on the peculiar ability of trial judges to observe the demeanor and credibility of potential jurors, *id.*, at —— (slip op. 15–16),

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he would be unwilling to follow the law the court shall charge upon it and disregard and be unwilling to follow it or if he did follow it, it would be going against his principles, and therefore, I would rule that would be disqualification. If that exists, I intend to disqualify for cause." App. 6 (emphasis deleted).

The Court's statement that "the judge correctly stated the general standard for dismissal," *ante*, at 8, n. 2, comes immediately on the heels of a truncated quotation of the trial judge's ruling which omits the critical phrase, "if he did follow it, it would be going against his principles, and therefore, I would rule that would be disqualification."

The court gave petitioner a continuing objection to its proposed *voir dire* questioning. App. 7. Even if this continuing objection were not enough standing alone to preserve petitioner's claim—and the Court does not so hold—the statement that "[n]o specific objection was made to the excusal of Murphy by defense counsel," *ante*, at 9, is flatly contradicted by the trial transcript. Immediately following Murphy's excusal, the court directed the stenographer to "note the defendant's object to him being excused for cause." Tr. 165.

make sense when there is "every indication that the judge . . . applied the correct standard." *Id.*, at —— (slip op. 19). But the record before us today provides no such indication. It is impossible to determine whether the judge's finding of bias reflected a belief that Murphy would be unable to follow the court's instructions or a belief that Murphy would have to set aside his personal beliefs to do so. In fact, Murphy never gave any indication that he could not follow the court's instructions. The burden of proving Murphy's bias rested on the State. *Id.*, at —— (slip op. 10–11). The Court's present heavy reliance on "the context surrounding Murphy's exclusion," *ante*, at 7, simply cannot support its conclusion because the trial court's improper interpretation of *Witherspoon* infected that context.

The Court's statement that "the trial court could take account of the fact that Murphy was present throughout an entire series of questions that made the purpose and meaning of the *Witt* inquiry absolutely clear," *ante*, at 9, suffers from a similar defect.[8] I find implausible the Court's assumption that Murphy followed closely the day-long questioning of other jurors. But if that assumption were correct, then the Court should also assume that Murphy anticipated being asked whether his beliefs would prevent or substantially impair performance of his duties as a juror, as other jurors expressing similar sentiments had been asked. That three other jurors, under somewhat more extensive questioning, explicitly stated that *they* did not think *they* could vote for the death penalty, see Tr. 44 (juror Varney); Tr. 107 (juror Carn); Tr. 109–110 (juror Maher), says nothing about whether *Murphy* shared their inability to put aside personal beliefs and obey his oath as a juror. *Witt* may be right that "many veniremen simply cannot be asked enough questions to reach the point where their bias has been made 'unmistakably clear,'" 469 U. S., at —— (slip op. 12); here, however, the judge did not even ask the one question that might have given him real insight into Murphy's ability to serve. The wrong answer is what no question at all begets. Cf. A. Bickel, The Least Dangerous Branch 103 (1962).

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[8] Even to refer to the "*Witt* inquiry" reflects inattention to chronology. This case was tried about a dozen years before *Witt* sought to dispel the "general confusion surrounding the application of *Witherspoon*" under which courts across the country had labored for 15 years. 469 U. S., at —— (slip op. 5). How the purpose and meaning of *Witt* could be clear to a layman like Murphy when they were unclear to the judge trying this case and to federal and state appellate courts is nowhere explained. Moreover, from Murphy's perspective, the purpose of the inquiry was to obtain from him truthful answers regarding his background and beliefs. His oath as a juror required him to reveal his strong feelings about the death penalty, even if he believed that he could follow the judge's instructions notwithstanding those feelings.

A close reading of the lengthy *voir dire* transcript leads me to conclude that the trial court's behavior is more easily explained by Murphy's appearance in the jury box at the end of a long day of questioning and the desire to finish jury selection expeditiously than by any definite impression on the part of the trial judge that Murphy was unqualified. But neither the trial court's eagerness to get the trial started, nor this Court's impatience with the progress of Darden's constitutional challenges to his conviction and death sentence, see, *e. g., Darden* v. *Wainwright*, —— U. S. ——, —— (1985) (THE CHIEF JUSTICE, dissenting from the grant of certiorari because 12 years had elapsed since Darden's conviction and sentence and no fewer than "95" judges had reviewed the case),[9] renders Murphy's exclusion justifiable or harmless.

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[9] A public dissent from a grant of certiorari is extremely rare. Indeed, I know of no other recent case in which a Justice has dissented on the ground that the claims raised by the petitioner—which at least four Justices must have found worthy of full consideration—were meritless. See also *Ohio ex rel. Eaton* v. *Price*, 360 U. S. 246, 247, n. 1 (1959) (memorandum of JUSTICE BRENNAN) (finding only one instance of such a dissent—the extraordinary case of *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U. S. 937 (1952), where certiorari was granted prior to the Court of Appeals' judgment). The concurrence filed by THE CHIEF JUSTICE today, see *ante*, to justify his dissent from the grant of certiorari in this case

III

Twice during the past year—in *Young* and again today—this Court has been faced with clearly improper prosecutorial misconduct during summations. Each time, the Court has condemned the behavior but affirmed the conviction. Forty years ago, Judge Jerome N. Frank, in dissent, discussed the Second Circuit's similar approach in language we would do well to remember today:

> "This court has several times used vigorous language in denouncing government counsel for such conduct as that of the [prosecutor] here. But, each time, it has said that, nevertheless, it would not reverse. Such an attitude of helpless piety is, I think, undesirable. It means actual condonation of counsel's alleged offense, coupled with verbal disapprobation. If we continue to do nothing practical to prevent such conduct, we should cease to disapprove it. For otherwise it will be as if we declared in effect, 'Government attorneys, without fear of reversal, may say just about what they please in addressing juries, for our rules on the subject are pretend-rules. If prosecutors win verdicts as a result of "disapproved" remarks, we will not deprive them of their victories; we will merely go through the form of expressing displeasure. The deprecatory words we use in our opinions on

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shows why. As JUSTICE BRENNAN persuasively explained in *Price*, a public dissent from a grant of certiorari poses dangers both to the actual workings of the adjudicatory process and to public respect for that process. 360 U. S., at 247–248. By reprinting his dissent in its entirety and emphasizing once again the number of times this Court has been asked to review Darden's claims, THE CHIEF JUSTICE suggests that he irrevocably had committed himself to rejecting those claims before he had received the benefit of the full briefing, oral argument, access to the record, and discussion of the issues by other Members of the Court that followed our grant of certiorari. To me, the fact that this Court has granted certiorari three times is hardly a reason for concluding Darden's claims are meritless, or that the undoubted interest in finality should outweigh our duty to ensure that Darden receive due process.

> such occasions are purely ceremonial.' Government counsel, employing such tactics, are the kind who, eager to win victories, will gladly pay the small price of a ritualistic verbal spanking. The practice of this court—recalling the bitter tear shed by the Walrus as he ate the oysters—breeds a deplorably cynical attitude towards the judiciary" (footnote omitted). *United States* v. *Antonelli Fireworks Co.*, 155 F. 2d 631, 661, cert. denied, 329 U. S. 742 (1946).

I believe this Court must do more than wring its hands when a State uses improper legal standards to select juries in capital cases and permits prosecutors to pervert the adversary process. I therefore dissent.